Petition

81-421

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No._____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

AND

COLVILLE CONFEDERATED TRIBES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Notwithstanding the long recognized and widely relied upon application of Washington State's water right laws authorizing non-Indians to make beneficial use of excess waters[1] located on allotted fee lands owned by non-Indians within the Colville Indian Reservation, are those state laws barred from application by reason of a federal preemption resulting from the creation of that reservation?

2. Do water rights reserved by the United States for the Colville Tribe under the *Winters* Doctrine[2] include, in addition to those for irrigation water for agricultural purposes, rights to support an experimental fishery in a small reservation-restricted stream as a substitute for a fishery in the Columbia River terminated by actions taken directly or authorized by the federal government?

THE LIST OF PARTIES BELOW

The parties to the proceedings in the Court of Appeals were the State of Washington, the United States of America, the Colville Confederated Tribes (hereinafter "Tribe"), and William Boyd Walton, et ux. (hereinafter "Walton").

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[1]As used herein, "non-Indians" refers to both non-Indians and Indians who are not members of the Colville Tribe. "Excess waters" refer to waters located on non-Indian owned lands within an Indian reservation that are not needed to satisfy the exercise of senior priority federal reserved water rights of Indians.

[2]The reserved rights or "Winters" doctrine, originated by this Court in *Winters v. United States*, 207 U.S. 564 (1908), was described recently in *Cappaert v. United States*, 426 U.S. 128, 138 (1976), as follows:

> This Court has long held that when the Federal Government withdraws its land from the pubic domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.

At 426 U.S. 139, this Court further pointed out that the federal reserved water rights

> * * * doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams."

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner State of Washington respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on June 1, 1981.

OPINIONS BELOW

There are four pertinent opinions and related entries of the District Court for the Eastern District of Washington. The main opinion of the District Court, reviewed by the Court of Appeals, is reported at 460 F. Supp. 1320 (E.D. Wash. 1978). The other three reviewed entries, dated February 9, 1979 or July 17, 1979, are not reported.

The Court of Appeals issued two opinions. The first, unreported, was filed on August 20, 1980. A second, replacing the first, was filed on June 1, 1981 and is reported at 647 F.2d 42 (9th Cir. 1981).

All of the above-noted opinions and orders appear in the appendix hereto and in the order of their mention above.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The first opinion of the Court of Appeals was entered on August 20, 1980. Petitions for reconsideration were filed by Walton and the State. On June 1, 1981, a timely petition by Walton for a rehearing en banc was denied and a second replacement opinion was entered. Appendix F. This petition for certiorari was filed within 90 days of June 1, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND ORDERS INVOLVED

The pertinent provision of the United States Constitution involved is Article VI, cl. 2, which provides in part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; * * *

Washington's surface water rights code of 1917, as amended, is set forth in part in Appendix I.

STATEMENT OF THE CASE

I. The Colville Indian Reservation

A. The Reservation's Creation — Its Checkerboard Ownership and Mixed Residential Patterns.

The Colville Indian Reservation, created by an executive order of President Grant in 1872, is located entirely within the State of Washington. (See Appendices G and H.) Over the years, reservation lands were opened to

acquisition and settlement by non-Indians under authority of the General Allotment Act of 1887, and of an act authorizing the homesteading of surplus lands. 25 U.S.C. § 331 et seq. and Public Law 59-61, ch. 1126, 34 Stat. 80 (1906). Of the reservation's 1,300,000 acres, approximately 300,000 are now owned by non-Indians. Slightly more than fifty percent of the residents of the reservation are non-Indians.[3] *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 143 (1980).

B. The Reservation's Association with Large International and Interstate Streams.

The Colville Reservation contains many streams. These include the Columbia and Okanogan rivers, two international streams that flow within the reservation and form its eastern, southern, and western boundaries. Numerous streams of the Colville Reservation are tributaries to the Columbia River. A small stream — No Name Creek[4] — originates and terminates within the exterior boundaries of the Colville Reservation.

C. The Long History of State Water Right Authorizations Within the Reservation's Boundaries.

For over six decades water rights based on state law have been relied upon for the diversion of waters located on

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[3](a) Indian reservations in Washington State are not enclaves held only for Indian residency. Mixed Indian and non-Indian population patterns on Indian reservations in Washington State are commonplace. This Court has recently dealt with pluralistic community situations on several Washington reservations. For example, the Yakima Reservation's population is eighty-eight percent non-Indian. *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977). See also *Montana v. United States*, 450 U.S. ——, 101 S.Ct. 1245 (1981) involving a similar mixed resident pattern on the Crow Reservation.

(b) There are twenty-two Indian reservations within the state. The total acreage of these reservations is approximately 3,150,000 of which approximately one-fourth are owned by non-Indians. Burke, *The Legal Relationship Between Washington State and its Reservation-Based Indian Tribes*, 14 (1978).

[4]Even this creek is a distributary arm (by underground connection) of Omak Creek, a tributary of the Okanogan River which in turn is a tributary to the Columbia River.

property owned by non-Indians within the reservation's boundaries. Two years after enactment of its surface water code in 1917, the State issued its first permit authorizing the diversion of waters for use within the Colville Reservation's exterior boundaries. Subsequently the State of Washington has issued approximately one hundred and thirty-six similar water right permits.

II. The Water Right Dispute — Its Reservation-Wide and No Name Creek Contexts

In one sense this case centers on a dispute over uses of water, by both non-Indians and the Tribe, of a small reservation-restricted stream flowing through their lands in the sparsely settled No Name Creek Valley. However, the subject matter of the case, including the relief requested by the Tribe, involves all waters within the reservation. Appendix C, page C-3, 4, 5. Thus, the dispute is divisible into two geographical contexts.

A. The Reservation-Wide Issue

The broader geographic context involves both past and future permit-issuing actions of the State of Washington, *on a reservation-wide basis*, relating to excess waters on non-Indian fee lands. The contention of both the Tribe and United States in the District Court — at first rejected on review by the Court of Appeals but now apparently accepted by the same Court — is that, as a matter of law, the state may not apply its water right permit system to *any* waters located within the exterior boundaries of the reservation regardless of the facts. Thus, an impermeable wall exists along the reservation's boundaries that state law cannot pierce, regardless of the intended limit of the Tribe's reserved right and regardless of the extent of any remaining excess waters within the reservation. The reasoning of the Court of Appeals' second opinion, which we are here asking this Court to review, leads to an invalidation of all existing state permits pertaining to excess waters located within the reservation and, as well, an injunction against similar permit-issuing actions by the state in the future.

B. The No Name Creek Dispute

The second geographic context relates to the No Name Creek Valley. In 1948 Walton (a non-Indian) purchased and settled on three parcels of lands (formerly Indian allotments) located in the center of that narrow mountain valley. Shortly thereafter, Walton applied to the State's supervisor of water resources for a permit authorizing the diversion of water from the creek, as it flowed through the three parcels, to irrigate his recently acquired lands as part of his newly established dairy operation. Neither the United States nor the Tribe then objected to the approval of the permit. Accordingly, in 1949 the State issued a diversion permit which, by its own terms, stated that it was subject to existing rights. Relying on the State's authorization, Walton used waters of the creek for his dairy farm without objection for the next two decades.

III. Proceedings Below

A. In the District Court

In 1970 the Tribe brought an action against Walton contending interference by Walton with the Tribe's water rights. Then, in 1973, the United States initiated a similar action against Walton and the State over water use within the Colville Reservation by Walton particularly and by non-Indians throughout the reservation generally.

These cases were consolidated by the District Court, *sua sponte*. The issues to be resolved in the consolidated litigation were divided into several general areas. As related to the interests of the State of Washington, those areas included:

First, the challenge to the authority of the state to apply its water right laws to excess waters located on non-Indian lands within a reservation. The respondents (plaintiffs below) requested that the District Court:

1. Declare invalid Walton's state water right permit;
2. Declare invalid all other state permits pertaining to diversions of excess waters located elsewhere in the reservation; and

3. Enjoin the State from issuing further permits authorizing similar diversions.

The District Court upheld the state's reservation-wide authority and rejected these requests. Appendix C, page C-3, 4, 5; and Appendix A, page A-15 through A-18.

Second, the extent of the Tribe's reserved rights and whether they related in any way to a fish spawning use in No Name Creek. The arguments here amounted to contentions that:

1. A reserved right was created, with the establishment of the Colville Reservation, for an experimental exotic sport fish spawning use in a stream that in its natural condition did not contain any valuable native fishery whatever; and
2. The use of water embodied in a right for a specific reserved use may be changed to another use by the Tribe.

The District Court refused to confirm the Tribe's claim for the experimental exotic fish spawning water right, but agreed with the Tribe on the second issue. Appendix C, pages C-2; and Appendix D, page D-2.

B. In Court of Appeals

The Court of Appeals first issued an opinion on August 20, 1980 affirming the District Court in all major respects. Petitions for reconsideration on limited aspects of that opinion were then filed by Walton and the State. And thereafter, without a further hearing, the Court of Appeals, on June 1, 1981, reversed itself by confirming that an impliedly reserved "replacement" right existed for an exotic fish spawning use on No Name Creek. Further, for some unexplained reason and disregarding the fact that *no one* (party or amicus curiae) had urged reconsideration of the initial holding that state water right laws may be applied on the reservation, the Court also reversed itself on that issue and, denying such state authority, invalidated Walton's permit.[5] This latter reversal was explained by the

[5]The Court also changed its position on a third major issue by holding that a non-Indian purchaser of an allotment acquired, at least conditionally, the reserved water rights of the Indian seller. Appendix F, page F-11 et seq.

conclusory statement that "in creating the Colville Reservation the federal government preempted state control of the No Name System." Appendix F, page F-18.

IV. Recapitulation — Scope of Proceedings

Solely from a reading of only the Court of Appeals' second opinion, Appendix F, pages F-16, F-19, it might be inferred that this case relates only to No Name Creek. So that there is no misunderstanding on that count, however, we would emphasize that the District Court's opinions and judgment, which were before the Court of Appeals for review, raised issues not nearly so geographically restricted as that Court's second opinion might imply. Before the District Court, the United States (in its complaint) and later the United States and the Tribe (both by motions for summary judgment) contended that the State of Washington was precluded, by the creation of the Colville Reservation, from application of its water rights laws to *any and all* waters located within the reservation. The District Court's decision, as above indicated, rejected that contention as follows:

> VIII. The State of Washington has the right and authority to issue permits to non-Indians for the use of waters within the Colville Indian Reservation in accordance with the provisions of the law of the State of Washington, PROVIDED, HOWEVER, that any use of water authorized by the State is subject to the prior reserved right to the use of water held by the United States for the benefit of the Tribe and its members.
>
> * * *
>
> XI. The requests of plaintiffs for orders declaring all permits and certificates issued by the State of Washington for the use of water within the Colville Indian Reservation to be null and void and that the State be enjoined from issuing further permits or certificates for the use of water within the Colville Indian Reservation are DENIED.

Appendix C, pages C-3, C-4.

In turn the Court of Appeals, in its *first* opinion, dealt directly with the same reservation-wide issue by affirming the provisions of the District Court with these words:

> The trial court determined that Washington is not preempted from regulating reservation water which is not reserved for or used by non-Indians. We hold that the State may apportion this water among non-Indians, * * *

Appendix E, page E-15.

The Court thereafter reemphasized the point:

> The trial court correctly concluded that state allocation of surplus water among non-Indians was not preempted. (Citations omitted.)

Appendix E, page E-16.

Later, however, the Court of Appeals' abandoned this type of precision and issued its *second* opinion which, from at least some of its reasoning, infers that the District Court's reservation-wide ruling (as well as its No Name Creek ruling) was also reversed. Accordingly, the reservation-wide issue is for that reason an appropriate subject for review here.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. Whether the federal government has precluded the application of state water right laws to excess water located on non-Indian owned allotment lands within an Indian reservation is a question of unsettled federal law of great importance to Washington State and other western states.

The inevitable result of the Court of Appeals holding is to remove the State entirely from the field of water rights allocation within an Indian reservation, even as to excess waters located on non-Indian owned fee lands. Such a sweeping preemption, however, radically upsets an area of traditional state competence, ousting states from their historically recognized powers.

A. Background — Federal-State Relationships in the Administration of Water Laws in the West:

(1) A Well Established Federal Policy of Deference to State Water Rights Law Administration

Under our constitutional system both the United States and the states have broad overlapping powers over waters within a state. *Federal-State Relations in Water Law,* National Water Commission Study No. 5, chapters III, V (1971). Historically, however, the United States has deliberately not been assertive in the exercise of its constitutional powers in the field of water rights establishment and administration. The Congress, for example, has never enacted a comprehensive federal water rights code. Rather, since the earliest days of settlement in the western states, federal policy has been one of general deference to state water right laws and encouragement of the enactment and active implementation of those laws. *California v. United States,* 438 U.S. 645 (1978); and *United States v. New Mexico,* 438 U.S. 696 (1978). See also *Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604 (1978). This policy of deference has been so extensive that today many major federal activities using water, whether operated by the government directly or through federal licensees, are subject to state water right laws. *California v. United States, supra.* Likewise waters on federal lands, including reserved lands, have been subject to these state laws. *United States v. New Mexico, supra.* Even in the one limited area of federal assertiveness in the water rights field — creation of water rights by implication under this Court's "reserved rights" doctrine — the United States has chosen to subject those rights to both the "general adjudication" and water administration programs of the states. See 43 U.S.C. § 666 (1976); and *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976).

(2) The Enactment and Assertive Administration by Western States of Water Right Codes — A Comprehensive, Unitary System of Administration for Each of the Western States.

Under their traditional and broad powers over water resources the western states have implemented comprehensive, sophisticated water rights programs. National Water Commission, *A Summary-Digest of State Water Laws,* ch. 2 (1973), and Clark, *Waters and Water Rights,* Vol. I, ch. 2,

(1967). These state water rights codes establish unitary systems covering all phases of administration of water use, ranging from the adjudication and regulation of existing water rights to the planning for and creation of new rights. An essential feature of these state laws is protection of all existing water rights, whether created under federal or state law or held by an Indian or non-Indian.[6] See *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 812 (1976).

Of special concern is the potential for conflict between the administration of these state codes and the exercise of Indian reserved rights. Litigation of such matters has been surprisingly sparse. In fact, the relationships have mainly been harmonious.[7] As described above, during the past sixty years, Washington has issued more than one hundred water rights permits pertaining to diversions within the Colville reserve. Each of those permits has been issued under a state code designed, in a fail-safe fashion, to insure that any authorization to divert water cannot interfere with rights of an earlier priority, including rights of the Tribe and its members. That insurance is contained in the state code mandate that its administrator shall only issue permits "subject to existing rights" which, of course, includes prior federal reserved rights. See *Funk v. Bartholet*, 157 Wash. 584, 593, 289 Pac. 1018 (1930).

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[6](1) A portion of Washington's water rights code, Rev. Code Wash. 43.21.130 (1979), provides that the code's administrator "* * * shall regulate and control the diversion of waters in accordance with the rights thereto." See also Rev. Code Wash. 90.03.010 and 90.03.245 (1979). See Appendix I, page I-1.

(2) Over the past two decades Washington State courts have, in "general adjudication" proceedings, confirmed reserved right claims of the United States. In *In re Chiliwist Creek*, Okanogan County Superior Court No. 16323, *In re Bonaparte Creek*, Okanogan County Superior Court No. 17787, and *In re Antoine Creek*, Okanogan County Superior Court No. 34113, reserved rights were claimed by the United States for Indians.

[7]An excellent discussion of the harmonious relation between federal reserved rights and state water rights law is found in Dufford, *Water for Non-Indians on the Reservation: Checkerboard Ownership and Checkerboard Jurisdiction*, 16 Gonzaga L. Rev. 95, 129 (1980), a portion of which states:

State law cannot allocate any portion of the water reserved for

B. The Establishment and Subsequent Administration of the Colville Reservation Reveals No Intent to Wholly Preclude Application of State Water Laws within the Reservation.

Against this backdrop of unswerving federal support for a unitary policy of state water rights administration that harmoniously honors federal law, however, the Court of Appeals held that application of the state's water rights law to the No Name Creek system simply "was preempted by the creation of the Colville Reservation." And for support of this sweeping preemption of traditional western water law, the Court simply "adhered" to a prior discussion in one brief paragraph of *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939), to the effect that "state water rights laws are not controlling on an Indian reservation." Appendix F, page F-18. We submit, however, that that Court's approach to this preemption issue is fundamentally flawed.

(1) Establishment Of A Reservation Does Not Create an Impermeable Wall Through Which State Laws Cannot Pierce Absent Congressional Authorization.

Any notion that Indian reservations are federal enclaves within which state laws have no applicability, absent

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Indians. It can only operate to grant a right to use water Indians do not require. Moreover, if the priority system is properly administered, there is no way that the exercise of state-created rights can infringe upon the Indian rights. Assuming that Indian autonomy extends to the internal distribution among tribal members of water within the reserved right, this authority in the tribe would only be interfered with if the state law failed to function according to its terms. Specific actions of the state in regulating the rights it has created could infringe on tribal rights if the state refused to recognize those rights and allowed junior state appropriators to use waters required by Indians holding superior rights. However, it would not be an impermissible invasion by state law on Indian self-government in such cases, but a misapplication. *The problem is not one of legal infringement, but of fear of illegal infringement.* The fear is an aspect of the general climate of distrust between Indians and non-Indians. The distrust is symptomatic of a profound and disturbing social problem. *But, though the fear is real, it cannot operate to define the law.* (Emphasis added.)

direct federal statutory authorization, has long been discredited. Thus, as this Court emphasized, in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), it has made "repeated statements"

> * * * to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self government or would impair a right granted or reserved by federal laws.

This Court has also, on many occasions, upheld the validity of application of state laws within a reservation without benefit of any federal statutory authorization. *New York v. Martin*, 326 U.S. 496 (1946), *Thomas v. Gay*, 169 U.S. 264 (1898), *Draper v. United States*, 164 U.S. 240 (1896), *Utah and Northern Ry. v. Fisher*, 116 U.S. 28 (1885), and *United States v. McBratney*, 104 U.S. 621 (1881). See also *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). Very recent examples include regulation of fishing in *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165 (1977), and collection of taxes in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). See also *Montana v. United States*, 450 U.S. ____, 101 S.Ct. 1245 (1981), and *Mescalero Apache Tribe v. New Mexico*, ____ U.S. ____, 101 S.Ct. 1752 (1981) (which recognized the validity of state hunting and fishing regulations on fee lands).

(2) Preemption Analysis Emphasizes Reconciliation of Federal and State Law.

The dramatic shift of position by the Court of Appeals in its two opinions, from recognition of the validity of state water rights law application to invalidation, is mystifying in light of well established principles of preemption analysis established by this Court. To begin with, this Court has emphasized that the proper approach to preemption contentions is to seek reconciliation of federal and state laws.[8] Absent actual conflict with implementation of federal

[8] In preemption analysis,

> * * * the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117,

laws, state laws thus should not be held to have been preempted. *Ray v. Atlantic Richfield Corp.*, 435 U.S. 151 (1978). And, in its *first* opinion the Court of Appeals, consistent with this reconciliation policy, pointed out the harmonious relationship between the reserved water rights of the Tribe and the operation of Washington's water right laws. Appendix E, page E-17. In its *second* opinion, however, that policy was totally disregarded.

(3) Historical Interpretations Should Be Accorded Great Weight in Preemption Analysis.

Historical understandings of government agencies and personnel are also valuable in preemption analysis, especially in resolving problems of state law applicability within Indian reservations and in analyzing federal-state relationships involving water rights law. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). See also *Montana v. United States*, 450 U.S. ____, 101 S.Ct. 1245, (1981), *California v. United States*, 438 U.S. 645 (1978), and *United States v. New Mexico*, 438 U.S. 696 (1978). Accordingly, the attention of the Court of Appeals was drawn by the state to a wide range of federal actions affecting Indian reservations, taken primarily in the late 1800's and early 1900's, all recognizing the validity of state law application.[9] Those actions included several federal statutory reenactments and their related legislative history, as well as administrative interpretations of the Department of the Interior. And again, while the *first* opinion of the Court squared with the relevant understandings of these historical recognitions, the *second* opinion did not.

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127 (1973), *quoting Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

[9]Washington's opening brief (at pages 20-27), in the Court of Appeals, documents these pertinent historical actions. That presentation centers on actions described in *California v. United States*, 438 U.S. at 659-662.

(4) The Court of Appeals Refused to Recognize or Follow Its Own Prior Decisions.

Even more difficult to account for is the failure of the Court of Appeals to mention, at all, two of its own prior decisions recognizing that a state may validly authorize a non-Indian to divert excess waters flowing within a reservation: *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. den.*, 352 U.S. 988 (1957) and *Conrad Investment Co. v. United States*, 161 Fed. 829 (9th Cir. 1908).[10] In *Ahtanum* at page 327 the Court said (with regard to a dispute over waters within Washington State's Yakima Indian Reservation):

> As the Winters case, both here and in the Supreme Court, shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. *Our Conrad Inv. Co. case, supra, held that what the non-Indian appropriators may have is only* the excess over and above the amounts *reserved for the Indians.*(Emphasis supplied.)

No significance was there attached to reservation boundaries for the purpose of this principle. See also *United States v. Wightman*, 230 Fed. 277 (D. Ariz. 1916).

(5) The Court of Appeals Completely Misapplied Three Very Recent Opinions of This Court

In addition, the second opinion of the Court of Appeals is so at odds with major teachings of three recently decided cases of this Court as almost to amount to a disregard of them. They are *Montana v. United States*, 450 U.S. ——, 101 S.Ct. 1245 (1981), *United States v. New Mexico*, 438 U.S. 696 (1978); and *Cappaert v. United States*, 426 U.S. 128 (1976).

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[10]In *Conrad Investment Co.*, the Court of Appeals upheld the validity of water rights established under Montana law authorizing the diversion of water by a non-Indian from a point on Birch Creek *within the Blackfoot Reservation*, above Indian diversion points, for agricultural irrigation use on non-Indian lands outside the reservation. The Court, while protecting fully the reserved rights of the tribe, allowed for partial satisfaction of the junior state-based rights of the Conrad Investment Company drawn from "excess waters" within the reservation. *Conrad, supra* at 834, 835.

For example, in concluding that the overriding federal policy of deference to state water laws does not apply to waters within reservations,[11] the Court of Appeals seemingly overlooked the express conclusion of this Court in *New Mexico*, 438 U.S. at 702 that:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that *the United States would acquire water in the same manner as any other public or private appropriator.* (Emphasis supplied.)

Coupling the last quoted sentence from *New Mexico*, with the teaching of *Cappaert* that the doctrinal base of reserved rights originated in *Winters v. United States*, 207 U.S. 564 (1908) (see footnote 2, infra) applies equally to all types of federal reservations — Indian and non-Indian, no reasonable doubt exists today that state water rights laws have applicability to excess waters on fee lands within Indian reservations.

The Court of Appeals' misapplication of the third and most recent case, *Montana*, is even more striking. Under the holding of this Court in that case, if Mr. Walton wishes to fish in No Name Creek as it flows through his ranch, such fishing would be subject to state, not tribal regulation. Yet the Court of Appeals has here held that if he extracts water, rather than fish, from that same portion of the stream, the regulatory jurisdiction switches. He is now subject to tribal or perhaps federal jurisdiction, *but not state.*[12] And that is

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[11]The Court of Appeals relied upon *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955) — the Pelton Dam case. That action was inappropriate, on its face, for *Pelton* dealt with the applicability of state laws to waters on *federally owned* reserved lands, while this case involves *privately owned* lands within a federal reservation, a decisively different situation.

[12]Fish, of course, are no less migratory than the water in which they swim. Also, just as with the water resource, the fishery resource may have to be divided between Indians and non-Indians pursuant to treaty. See,

so even when the water he extracts is excess to that which is subject to tribal rights under *Winters* even as broadly (and erroneously, we submit) applied by the Court of Appeals here.[13] And further, according to the Court of Appeals, this remarkable switch in jurisdiction is actually *required* by *Montana*.

In striking down, in *Montana*, the Crow Tribe's assertion of regulatory jurisdiction over non-Indian hunting and fishing on non-Indian lands, this Court first rejected the Tribe's claim of a treaty right to such jurisdiction. Emphasizing that under *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977) *(Puyallup III)*, "* * * treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands * * *", this court held that the asserted treaty right did not survive that alienation.[14] 450 U.S. at ____, 101 S.Ct. at 1256. But in addition, the Court likewise rejected a second basis for the tribe's jurisdictional claim: inherent tribal power. In so doing, it established that the principles of *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), are not confined to the criminal side but apply as well to *any* assertion of jurisdiction over nonmembers.

Here, however, instead of applying *Puyallup III* and *Oliphant* — as this Court did in Montana — the Court of Appeals seized upon certain dictum in *Montana* which states that a tribe may have jurisdiction over non-Indians on non-Indian lands if the non-Indian's conduct "* * * threatens or has some direct effect on the * * * economic security, or the health or welfare of the tribe * * *" 450 U.S. at ____, 101 S.Ct. at 1258. Relying on that dictum from a case that sustained state jurisdiction over fishing, the

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e.g., Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979). But this does not result in tribal jurisdiction over the *entire* resource, wherever found. It simply results in a legal requirement that the state regulatory system must not be in conflict with the Indians' rights.

[13]See, pp 19 et seq., *infra*.

[14]This Court's conclusion, at 450 U.S. at ____, 101 S.Ct. at 1256, that "* * * the 1868 treaty provides no support for tribal authority to regulate hunting and fishing on land owned by non-Indians "discredits the Court of Appeals analysis in this case that the executive order creating the Colville Reservation preempted Washington's water rights laws.

Court ousted the state from jurisdiction over the water.

Yet the Court of Appeals in no way showed how the state's authorization of Mr. Walton's withdrawals of excess water in which the tribe has no reserved rights whatsoever, constitutes a threat to those water rights which the tribe in fact does have. As we have shown at pages 11 and 12, *supra*, accommodating state jurisdiction and administration is fully compatible with federally reserved water rights, be they held for Indians or anyone else.

If the exception found in the *Montana* dictum can so completely swallow the rules applied in *Montana*, the rights of state and non-Indians are in severe jeopardy — and in more areas than just water rights. Cf., *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724 (10th Cir. 1980), judgment vacated, ____ U.S. ____, 101 S. Ct. 1752 (1981). This misapplication of *Montana* should therefore be reviewed and corrected.

C. The Court of Appeals Holding Establishes Erroneous Precedent That, Unless Corrected, Will Result In Confused, Ineffective Water Rights Administration for Many Stream Systems of the West.

A cardinal objective of water rights law, as in other areas of real property law, is certainty. The most obvious detrimental impact of the Court of Appeals' holding is thus the heavy cloud of uncertainty it places over the many water rights now relied upon by non-Indian water users which have been established under state law. The precedential spill-over effect of the holding, of course, is not just limited to reservations in Washington State, but affects most other western states.[15]

The disruptive aspects of the holding for reservation residents are many. Under that holding neither Indians nor non-Indians may now rely upon state water right permits or the protections that a state administration system affords

[15]For example, in an amicus curiae brief filed with the Court of Appeals, Wyoming pointed out it had issued over nine hundred permits to divert waters within Wyoming's Wind River Indian Reservation over the past one hundred years.

to all on a stream system, especially in times of water shortage. Additionally, unless it is reversed, non-Indian landowners will be placed in the unfortunate position of having no opportunity whatever to establish rights to surplus waters flowing on their lands because the sole base for their establishment, state law, will have been ousted.[16] Non-Indian residents will be left with the real possibility that they hold no water rights for their lands, depending on whether any reserved rights were acquired by a non-Indian as an incident of the original purchase from a tribal allottee.[17]

The Court of Appeals' ruling also seriously under-

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[16](a) Note that the Department of the Interior has no present statutory authority to adopt a comprehensive water code applying to excess waters within a reservation. Cf. 25 U.S.C. § 381 (1976). And while Congress certainly has the constitutional power to enact laws filling the regulatory void created by the Court of Appeals' holding, it has shown absolutely no interest whatever in creating, or authorizing the creation of, preemptive federal water right codes.

(b) Likewise, limitations on a tribe's powers preclude a tribe from administering a code applying, per se, to *all* waters within a reservation. *Winters v. United States*, 207 U.S. 564 (1908). First, its water right interests relate only to reserved usufructs, rights to divert and make use of waters of specific streams. Such rights do not give the tribe any ownership of the corpus of the waters with a stream. Weil, *Water Rights in the Western States* § 59 et seq. (2nd Ed. 1908). Second, the tribe's "inherent" powers extend, at the most, to the protection of these usufructory rights. Such powers, limited as they are in terms of both property interest and enforcement capability, could not support the enactment of an *effective* and *comprehensive* water code that applies to all waters (including surplus waters on fee lands) and to non-tribal member landowners. A tribe has no criminal jurisdiction over non-Indian activity in fee lands, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and extremely limited civil authority over such activity. *Montana v. United States*, 450 U.S. ——, 101 S.Ct. 1245 (1981).

[17]Under the Court of Appeals' second opinion, a fee land purchaser *may* obtain reserved rights as an incident of the purchase. Appendix F, page F-11. "May" is emphasized because of the Court of Appeals holding that

> • • • the non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.

Appendix F, page F-15.

mines the very foundation of historic federal water rights policy for the entire western United States. By stripping state authority over excess waters on fee lands the federal policy objective of achieving a single unitary water rights administration system in each state is materially impaired. Without apparently realizing the impact of its ruling the Court has created a zone of unregulated water within reservations — water free from any federal or state sanctioned or recognized water rights administration program whatsoever.

In short, the Court of Appeals' decision has created a chaotic condition for administration of state water right laws both within and without Indian reservations throughout the West.

II. Whether the United States, when it created the Colville Indian Reservation in 1872, intended to create a water right for an experimental exotic sport fish spawning use in a stream with no natural valuable sport or commercial fishery, is an important question of federal law, involving an interpretation of the federal reserved water rights doctrine.

No Name Creek enters Omak Lake approximately one mile downstream from Walton's farm. The lake, having no natural outlet and because of its chemical make-up, cannot support a native trout fishery. Two decades after Walton began his dairy operation in No Name Valley and almost a century after the reservation's creation, the Department of the Interior introduced an exotic Lahonton trout into the "dead" Omak Lake as an experimental sport fishery project.[18] The Tribe claimed a reserved water right for Lahonton fish spawning use in the lower reach of No Name Creek — a claim the United States (as owner of the Indian's

[18]In 1968, the Department of the Interior initiated an experimental planting of a hatchery-bred exotic, known as the Lahonton trout, in Omak Lake. Periodically, the lake was replanted with these hatchery stocks — descendants of fish native to Nevada. In the mid-1970s the marshy lower reach of the No Name Creek was altered by a channelization project. Thereafter the stream ran through an artificial channel, made of wooden side boards and an introduced gravel bed, to be used as an experimental spawning area for the Lahonton trout.

rights) characterized before the District Court as "untenable."

The Court of Appeals recognized that claim. Appendix F, page F-9. In so doing the Court reasoned that, because opportunities of the Colville Tribe to catch fish in Columbia River had been destroyed by dams (constructed and operated by the United States or its licensees), a "replacement" reserved right should be implied attaching to No Name Creek. This accords with the Court's view that the "general purpose" of an Indian reservation is "to provide a home for Indians * * * a broad one * * * [that] must be liberally construed." Appendix F, page F-7, F-8.

As previously described, at page 15, a reserved right is to be implied only when necessary to fulfill the "very purpose," the primary purpose, for which a reservation is created. *United States v. New Mexico*, 438 U.S. 696, 700 (1978). Water rights for "secondary" purposes, even when of significant benefit to the reservation, are not implied under the reserved rights doctrine. *New Mexico*, 438 U.S. at 700, provided further that:

> Each time this court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, concluded that *without the water the purpose of the reservation would be entirely defeated.* (Emphasis supplied.)

In this case the Court has implied a water right on a stream with no physical connection whatsoever to the Columbia River. (The Columbia River is more than fifteen miles south of the reservation restricted No Name Creek.) The right has been implied even though the No Name Creek-Omak system, due to its natural condition, supported no native commercial or sport fishery. Additionally, the right relates to an exotic fish which is native neither to the Columbia River nor the No Name Creek system. The Court went even further by concluding that that such a "vested property right" need not be exercised for the replacement reserved fish spawning use but the Tribe "may use it in any lawful manner." Appendix F, page F-9.

This decision has terribly confused the law of reserved

rights that had appeared to be reasonably clarified in *New Mexico* and *Cappaert*. The Court has held that a reserved right, amounting to a fish hatchery use right of a patently secondary nature, blankets the entire Colville Reservation, attaching to every stream system that might produce a fishery no matter how small. This implied right springs into effect if, at any time and for whatever reason, a fishing opportunity existing on an unrelated stream is terminated.

Thus, the Court of Appeals has transformed the reserved right doctrines' narrowly based "primary purpose" test, into a broad, liberally construed, economic benefit use test; a test that mandates an implying of a reserved right whenever it is determined that the proposed use will promote, in some general way, "a homeland for the survival and growth of the Indians and their way of life." Appendix F, page F-10. This new doctrine, with its expansive view of reserved rights, dramatically increases the potential for displacement of existing water-use based economic units, developed in response to federally espoused policies, both on and off Indian reservations throughout the West. The tensions that now exist in the West over water use, arising from the uncertainties inherent in the reserved rights doctrine, have unquestionably worsened by the Court's action.

Measured against this background, the actions of the Court of Appeals raise important and significant issues of federal law that merit review and settlement by this Court.

CONCLUSION

Finally, as shown by the incompatibility of its first and second opinions, it is clear that the Court of Appeals has struggled with the several important issues of first impression raised by this case. And accordingly, recognizing that its decision should not be the last, the Court of Appeals directed the last four sentences of its opinion to this Court:

> * * * State and federal courts, state and federal agencies responsible in water rights administration, and the numerous Indian tribes, allottees and their transferees, are plagued almost on a daily basis with the problems and uncertainties surrounding the issues

> discussed in this opinion. *This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in western water and land law.* A definitive resolution is overdue. The magnitude of the problem cannot be overstated. (Emphasis supplied.)

Appendix F, page F-20, footnote 18.

For all of the reasons given above, including this urging of the Court of Appeals itself, the Writ of Certiorari should be granted.

Dated: August 28, 1981.

Respectfully submitted,

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No._____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

AND

COLVILLE CONFEDERATED TRIBES,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

MEMORANDUM OPINION

[October 25, 1978] [Reported at 460 F. Supp. 1320]

No. C-3421

COLVILLE CONFEDERATED TRIBES, Plaintiff,

vs.

BOYD WALTON, JR. et ux, et al., Defendants.

STATE OF WASHINGTON, Defendant-Intervenor,

No. C-3831

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM BOYD WALTON, et ux, et al., and THE STATE OF WASHINGTON, Defendants.

In these consolidated cases plaintiffs seek declaratory and injunctive relief relating to the rights to waters of a very small waterway located entirely within the exterior boundaries of the Colville Indian Reservation in north central Washington. As the result of this extended litigation this formerly nameless waterway has acquired the appelation "No Name Creek". Because the surface water of No Name Creek has a hydraulic relationship with the underlying aquifer, these actions include rights to both surface and ground waters of the creek basin.

The Colville Confederated Tribes (Tribe) brought suit in 1970 to enjoin defendants Walton, who are not Indians, from using No Name Creek waters, claiming that the tribal reserved water rights were superior to Waltons' rights and that there was insufficient water to satisfy both the Tribe's and Waltons' needs. The State of Washington intervened asserting its authority to grant water permits on reservation lands. The United States brought suit against Waltons and the State of Washington, alleging identical

issues of reserved water rights. The actions have been consolidated.

This Court has jurisdiction in Cause No. 3421 under 28 U.S.C. §1362 and jurisdiction in Cause No. 3831 under 28 U.S.C. §1345. In these actions the Court must determine first, the relative water rights of the tribe and defendants Walton, and second, the relative authority of the tribe, the United States, and the State of Washington to regulate, allocate and control the subject water.

BACKGROUND[1]

No Name Creek and its basin lie entirely within the Colville Indian Reservation. The Reservation was established by executive order on July 2, 1872, as a home for various bands of Indians now known as the Colville Confederated Tribes. It is located in a semi-arid and mountainous region in north central Washington. No Name Creek, which originates on Allotment No. 892 north of the Walton property, is spring fed, flows southerly approximately three miles and empties into Omak Lake. The lake is composed of saline water, unsuitable for irrigation purposes.

Water from the No Name Creek basin presently serves seven parcels of land, all at one time allotted to individual Indians. The only lands within the basin presently held by non-Indians are the three allotments owned in fee by Waltons, each of which borders No Name Creek. The other four allotments in the basin are either held in trust by the United States for the heirs of the allottees and leased to the Tribe or are held in trust directly for the benefit of the Tribe. Historically, the two allotments to the north of Waltons were irrigated with surface waters from Omak Creek located on the northernmost allotment, while the two allotments south of Waltons were irrigated with waters diverted from No Name Creek.

Defendants Walton claim water rights on two theories. First, they claim rights as successors to Indian allottees. Second, they claim appropriative rights perfected under

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[1]See appendix for agreed facts and map.

state law. Using water diverted from No Name Creek and water pumped from an irrigation well drilled in the 1970's, Waltons are presently irrigating 105 acres.

Waltons' first claim is based on a tracing of the title to their land through mesne conveyances back to the original Indian allottees. The allotments now owned by the Waltons passed from Indian ownership in 1942. The former Indian allottees had not irrigated these lands. In 1946, this land was again sold, and although the purchaser was Indian, he was not a member of the Colville Tribes. When Walton bought the property in 1948, approximately 32 acres were under irrigation. Based upon the right to use of water by the Indian allottees, defendants Walton claim to have succeeded to a right to irrigate all of their irrigable acreage or, alternatively, to a right to irrigate a minimum of the 32 acres which were under irrigation at the time of purchase.

Waltons' claim to an appropriative water right is based on a state certificate. Immediately after purchasing the land in 1948, Walton applied to the State for a permit to divert 3 cu. ft. per second from the creek to irrigate 75 acres. Pursuant to this application the state in 1950 issued Walton a certificate of water right to irrigate 65 acres by diverting 1 cu. ft. per second. This certificate was granted "subject to existing rights".

The Tribe bases its claim to water on the doctrine of reserved water rights. It asserts the right to irrigate the 228 irrigable acres contained in the four Indian-held allottments within the No Name Creek Basin. In addition, the Tribe claims the right to sufficient water to support spawning grounds in the creek for Lahontan cutthroat trout.

Presently the Tribe is irrigating 157 of the 228 Indian-held irrigable acres in the basin. Some of these acres historically were irrigated from the surface water of Omak Creek and No Name Creek. In 1975 the Tribe initiated an extensive irrigation project in the basin. Wells were drilled on the northern allotments to provide irrigation waters for the northern acres, and some well water was pumped into No Name Creek to serve the needs of the two southern allotments. The crops grown on these allotments are used to

support the Paschal Sherman Indian School.

In 1968 the Tribe with the aid of the United States Department of Interior introduced Lahontan cutthroat trout into Omak Lake. At that time this species was classified as endangered. Although these trout thrive in salt water, they require fresh water spawning grounds. No Name Creek is the only fresh water source into the lake. The Tribe rerouted the course of lower No Name Creek to improve access from the lake to the fresh water spawning grounds. These trout are also artifically propagated in a federal hatchery in Winthrop, Washington and made available to the Tribe. The Tribe, however, claims a reserved right for water to maintain the spawning grounds in the creek.

The Tribe and the United States, as trustee, seek to enjoin Waltons' interference with tribal use of No Name Creek Basin waters. They also seek a declaration that the State of Washington has no jurisdiction to issue water permits within the boundaries of the Reservation and that the permits heretofore issued to Waltons are null and void.

This litigation requires a determination of four complex issues of Indian water rights: 1) what effect the General Allotment Act has on Indians' reserved water rights; 2) whether a non-Indian grantee of an Indian allotment may succeed to his Indian grantor's reserved rights; 3) the amount of water available to each party in this action; and 4) whether a state may issue water permits to non-Indian landowners within the boundaries of an Indian reservation.

EFFECT OF THE GENERAL ALLOTMENT ACT ON RESERVED WATER RIGHTS

Waltons claim a water right based on the prior status of their property as Indian allottments. They assert that the General Allotment Act, 25 U.S.C. §331 *et seq.*, passed to the individual Indian allottees a portion of the reservation's reserved water, which became appurtenant to the allotted land and was conveyed when the land was sold. An analysis of the effect of the General Allotment Act on the allottee's water rights requires an understanding of the origin of the

reserved water rights doctrine, the scope of that doctrine, and the purpose of the General Allotment Act.

In *Winters v. United States*, 207 U.S. 564 (1908) the Supreme Court established the doctrine of implied reservation of water. The Court determined that when the United States set aside lands as Indian reservations, it intended to provide a suitable homeland for the Indians so they could change from their nomadic ways to "become a pastoral and civilized people." *Id.* at 576. As recently noted by the Supreme Court, "It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation." *Arizona v. California*, 373 U.S. 546, 598 (1963). The creators of the western reservations were aware of the arid nature of the region, and of the fact that water is "essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Id.* at 599. When Congress placed the Indians on reservations, it took from them "the means of continuing their old habits" and therefore must have intended to give them "the power to change to new ones." *Winters, supra*, 207 U.S. at 577. Because the reservation lands were arid and were "practically valueless" without irrigation, the *Winters* Court held that the Indians were entitled to an adequate supply of water.

As defined in *Cappaert v. United States*, 426 U.S. 128, 138 (1976), the *Winters* reserved water rights doctrine provides that upon the establishment of any federal reservation the United States "reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." The *Winters* reserved water right "vests on the date of the reservation and is superior to the rights to future appropriations." *Id. Winters* rights apply to reservations created by executive order, as well as to those created by treaty or act of Congress. *Arizona v. California, supra* at 598. They extend to ground water as well as surface water. *Cappaert, supra* at 142-143. Where the purpose of establishing the reservation was to turn the Indians into an agrarian society, as is the case with the Colville Reservation, the amount of water impliedly

reserved is that which would satisfy future as well as present needs, measured in terms of enough water to irrigate "all the practicably irrigable acreage" on the reservation. *Arizona v. California, supra* at 600. The reserved rights are open-ended and do not depend on actual use to be maintained. Water is therefore available whenever needed to fulfill the purposes of the reservation. The reserved amount of water must be made available despite inequities to the non-reserved users. *Cappaert, supra* at 138. Therefore, reserved water rights are not lost by laches, estoppel or adverse possession. *See United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd.*, 330 F.2d 897 (9th Cir.), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965).

The General Allotment Act of 1887, (25 U.S.C. 331 *et seq.*) (the Dawes Act), was designed to help reservation Indians assimilate into the dominate culture by authorizing the division of communally-held tribal lands into specific tracts for each of the tribe's members. Unallotted lands within the reservations would then be opened to non-Indians with the apparent intent to promote interaction between the races to encourage Indians to adopt white ways. *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). It was hoped that the Indians would learn to farm their property from such association with white neighbors. Since the Indians were considered unsophisticated and the whites were known to desire increased land holdings, the allotted lands were to be held in trust by the United States for the allottees for twenty-five years, (25 U.S.C. 348) after which a fee patent could issue to the Indians. *Id.* Section 7 of the Dawes Act (25 U.S.C. §381) provides that where water is necessary for irrigation, the Secretary of Interior is authorized to see that the available water was divided in a just and equal manner among the Indians residing on the reservation.

This Court concludes, based upon a reading of the relevant cases, that the Dawes Act did not deprive the allottee of his share of the reservation's reserved water. Reserved rights belong to each individual Indian. *United*

States v. Winans, 198 U.S. 371, 381 (1905). Under the doctrine, tribal members own the reserved water from the time of the creation of the reservation; at the time a tribal member acquires an allotment, his reserved rights become appurtenant to his land. *United States v. Preston*, 352 F.2d 352, 358 (9th Cir. 1965). Thus, as stated in *United States v. Powers*, 305 U.S. 527, 532 (1939), when allotments were made, a portion of the waters within the reservation which had been reserved for the equal benefit of the tribal members passed to the allottees.

ALIENABILITY OF RESERVED WATER RIGHTS

As the discussion above indicates, the Indian allottee owns, as appurtenant to his allotment, his proportionate share of the reservation's reserved water. *Preston, supra*, at 358. He retains these rights after he is issued the fee patent to his allotment. *Power, supra*, at 532. The settled issued of what the Indian allottee owns is distinct, however, from the unresolved issue of what rights the allottee may alienate to a non-Indian.

The parties to this litigation have taken three different stances on this latter issue. Waltons and the State of Washington assert that since *Winters* rights are appurtenant to the Indian allotment, the rights are transferred at the time of the conveyance of the allotment to a non-Indian. The Tribe, on the other hand, contends that *Winters* rights are tribal rights and that Congress, in the Dawes Act, did not intend to divest the Tribe of those rights. The Tribe therefore argues that an allottee may only hold his proportionate share of the tribal rights while holding the land and may not alienate these water rights with his land when he sells the allotment to a non-Indian. The United States takes a middle ground. It asserts that the allottee may sell to a non-Indian a right to that portion of the water which was being put to beneficial use at the time the allotment left trust status and that this transferable water right would have a priority date of the establishment of the reservation.

Although several opinions arguably indicate that re-

served water rights appurtenant to an allotment may be conveyed to a non-Indian grantee, this Court finds no clear and binding precedent on the issue.

The Ninth Circuit has held that reserved water rights remain appurtenant to the allotted land when it remains in Indian ownership but is leased to a non-Indian, *Skeem v. United States*, 273 F. 93 (9th Cir. 1921). The Court was not faced in that action, however, with the issue of what water rights may be sold.

In another early decision, the Idaho Federal District Court held that the non-Indian purchaser of an Indian allotment located outside the reservation boundary acquired a water right to irrigate the acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation. *United States v. Hibner*, 27 F.2d 909 (D. Idaho 1928). The priority date was found to be the same as that owned by the Indian allottees — the date of the establishment of the reservation. *Id.* at 912. Unlike the Indian, however, whose rights were open-ended, and independent of actual use of the water, the purchaser took with a *Winters* priority date only that amount of water used by the Indian predecessors plus that which he could put to use within a reasonable time. The Court's conclusion was not appealed.

Almost two decades after *Hibner*, the Supreme Court faced the same Indian water rights issues, but avoided resolving those issues by disposing of the case on a procedural ground. In *United States v. Powers*, 305 U.S. 529 (1939), the United States sought to enjoin the defendants, non-Indian successors to allottees, from diverting water from above an irrigation project on the reservation. The Government claimed that owners of lands which were not part of the project were not entitled to divert water to the detriment of the project. Although this claim was dismissed by the trial court, it determined that allottees passed to their grantees whatever water rights they possessed. The court then proceeded to quantify those rights. The Ninth Circuit affirmed the dismissal of the United States' claim, but held that the trial court lacked

jurisdiction to quantify defendants' rights because parties indispensible to the action were not before the court. 94 F.2d 783, 786 (9th Cir. 1938). Included among the indispensible parties not before the court were Indian allottees living above the project. The Supreme Court affirmed. Neither the Ninth Circuit nor the Supreme Court determined what rights, if any, the parties had to the water in question. *Id.* at 786; 305 U.S. at 533. In response to the Government argument that allottees have no rights to the reserved water, the Supreme Court stated in dictum "that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." 305 U.S. at 532. The nature of this right, however, was left undefined.

The Court declines to rely on any of these cases in resolving the issue of alienability. The Court finds more instructive an analysis of first, the rationale for development of the reserved rights doctrine, and second, recent Supreme Court opinions concerning the concept of reserved rights generally.

An analysis of the rationale for the reserved rights doctrine convinces this Court that the implied reservation of waters on Indian reservations should be limited to Indian ownership. *Winters* doctrine rights were reserved to members of the Indian tribe living on the reservation. *Winters, supra,* 207 U.S. at 576; *Arizona v. California,* 373 U.S. at 600. Water was impliedly reserved to ensure that the lands intended to be permanent homelands for the Indians would have the necessary water to fulfill that purpose. *Id.* The Indians of the Northwest were not agrarian at the time they were forced onto reservations. The transition from the traditional nomadic life to an agrarian existence required the development of agricultural skills. Implied reserved water rights are open-ended so that as the Indians develop the necessary skills they are able to appropriate the water required to make the land productive. *See Winters, supra.* When title to Indian lands passes into non-Indian hands, the purposes for which the reserved water rights are implied no longer exist. It therefore seems logical to

conclude that reserved water rights on Indian Reservations are limited to Indians.

The conclusion that water rights reserved for Indian reservations must be limited to tribal members is supported by recent Supreme Court opinions which have articulated a more restricted view of the concept of reserved rights in general. In *Cappaert v. United States, supra,* the Court held that when the Government establishes a federal reservation it reserves "only that amount of water necessary to fulfill the purpose of the reservation, no more." 426 U.S. 128, 141 (1976). This limitation was reemphasized in *United States v. New Mexico,* _____ U.S. _____ 46 U.S.L.W. 5010 (U.S. July 3, 1978). The purpose of the reservation is to be determined from the intent of the creators at the time of the withdrawal from the public domain. *Id.* The reservation of water may be implied only where such water is essential to preserve the purpose for which the reservation was created. No reservation of water may be implied for any use which is not based on one of the purposes for which that land was reserved. *Id.* at 5015-16. Applying these recent restricted concepts of reserved rights, it is clear that when the reserved purposes are terminated, as when a national park is returned to the public domain or when Indian property is sold to non-Indians, the reserved rights can no longer be judicially implied.

This Court therefore, concludes that *Winters* reserved rights do not per se apply to allotments owned by non-Indians. This conclusion, however, does not foreclose possible availability of water to the non-Indian grantee.

The General Allotment Act in permitting sale of allotments to non-Indians necessarily implies that some water rights may be sold with the land; otherwise the right to sell the land would be relatively worthless. The Act was designed to put Indians on an equal footing with the white man by allowing individual Indians to own fee title to land. *See* Comments of Carl Schurz, Secretary of Interior, Report of Nov. 1, 1880, in 1 House Exec. 5-6, quoted in F. PRUCHA, AMERICANIZING THE AMERICAN INDIANS, 83-86 (1973). In providing fee ownership, Congress

certainly intended that the Indian could sell his land like any other owner. Providing for alienability of implied reserved water rights is not necessary to accomplish this purpose. The General Allotment Act purpose requires only that the allottee be permitted to convey a water right with his fee to the same extent as a non-Indian homesteader.

Non-Indians homesteaded much of the original Colville Reservation. Under the Desert Land Act, 19 Stat. 377 (1877), which severed water rights from lands in the public domain, *see California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 160-63 (1935), homesteaders of public lands were required to perfect water rights under state law and could convey only those water rights which they had so perfected. By an 1892 Act, Congress withdrew from trust status the northern half of the Colville Reservation, restoring that portion to the public domain and opening it to settlement. The Desert Land Act with its effect on water rights definitely applies to these northern lands. The southern half of the reservation was preserved, *Seymour v. Superintendent*, 368 U.S. 351 (1962), but the 1906 Congress, 34 Stat. 80, opened surplus unallotted lands within the "diminished" Colville Reservation to settlement under the homestead laws pursuant to the General Allotment Act. While it is not clear whether the surplus lands within the reservation became part of the public domain when they were opened for settlement, *Seymour, supra*, 368 U.S. at 355-56, and thus whether the Desert Land Act applied to those lands, strong policy arguments militate against implying reserved water rights for homesteaded surplus lands. To allow homesteaders to share in the reservation's reserved water rights would greatly diminish a valuable Indian asset. The General Allotment Act and the 1906 Act cannot be interpreted as giving non-Indian settlers a share of the Indians' reserved water rights, for such a Congressional intent is not clear, and the general rule of interpreting acts affecting Indians requires that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *McClanahan v. Arizona State Tax Comm'n*, 411

U.S. 164, 174 (1973), quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). *See also DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975). Thus, it would appear that settlers of surplus lands within the reservation may claim and transfer only rights to unreserved water.

In keeping with the purpose of the General Allotment Act, the allottee, like the non-Indian homesteader, must be permitted to convey with his land the water right which he was using at the time of the conveyance, with a priority date of the first appropriation of those waters. The priority date must be the date of actual appropriation rather than that of the founding of the reservation, for no part of the Indian allottee's implied water rights may be conveyed to a non-Indian. The value of allotments with these "in use" water rights, without *Winters* rights, is therefore comparable to homesteaded lands.

However, the *Winters* rights which were formerly associated with the allotment when held by a member of the tribe do not escheat to the tribe when the allotment is sold to a non-Indian. Since the purpose of the implied reservation is defeated by the sale to a non-Indian, the right is lost completely, and the number of irrigable acres in non-Indian hands may not be used to calculate the quantity of waters reserved for the lands remaining in Indian hands. By thus reducing the quantity of reserved waters within the reservation, more water is available for appropriation by non-Indian landowners.

Accordingly, the Court finds that Waltons succeeded to the water right to irrigate the 32 acres under irrigation at the time of acquisition, with a priority date of actual appropriation of water for that use.

QUANTIFICATION OF WATER RIGHTS

Water within the No Name Creek Basin is limited. Estimates as to available water in the Basin range from 550 acre feet per year as testified by the Tribe's expert witness to 1300 acre feet per year as testified by defendants' expert. A witness employed by the United States Geological Survey estimated that 1100 acre feet per year should be available for consumptive uses.

The four allotments remaining in Tribal ownership (or trust status) in the Basin contain a total of 228 irrigable acres, 157 of which are presently being irrigated. The northernmost of the four Indian-held allotments (allotment 526) is within No Name Creek water basin, but has no surface contact with the creek. In fact, another waterway, Omak Creek, traverses this allotment. There is evidence that allotment 526 was formerly irrigated with the plentiful surface waters of Omak Creek. Therefore, for purposes of quantification of water rights within the No Name Creek Drainage Basin, the acreage of the northernmost allotment will be excluded. The remaining three Indian-held allotments in the Basin contain 166.6 irrigable acres, 107.2 of which are presently under irrigation.

Estimates of the water duty, being that amount of water required per acre to grow crops, range from 4.8 acre feet to 3.6 acre feet. A witness from the United States Soil Conservation Service testified that most farmers in the Okanogan Valley near the No Name Creek Basin require 3.1 to 3.6 acre feet. Using 4.0 acre feet as the duty, the Tribe should have a total of 666.4 acre feet of water from the Basin per year reserved for their irrigable acreage within the Basin; and the Tribe would need 428.8 acre feet per year to irrigate the 107.2 acres presently under irrigation.

In addition to water for irrigation, the Tribe asks this Court to imply a reservation of water to support the Lahontan cutthroat trout spawning grounds. While the Tribe acknowledges that this species is non-indigenous, it claims that fish continue to be a traditional source of food for the members of the Tribe. Much of the natural source of fish for the reservation, the salmon and cutthroat trout runs on the Columbia River, was eliminated by construction of power and reclamation dams by the government. The Tribe asserts that fish was a natural food source for the Indians and that by establishing the reservation on the shores of the Columbia, President Grant intended to assure that fish would remain an available food source. Since the government-built dams have depleted that source of food, the Tribe claims it was imperative to introduce non-indigenous fish to replace the lost sources and to preserve

one of the purposes of the reservation.

Under the *Winters* doctrine, this Court must look to the purposes for which the reservation was created to determine the uses for which the reservation of water may be implied, and thus to determine whether the Tribe is entitled to water for the trout. *Cappaert, supra.* The Colville Reservation was set aside as a homeland for the Indians; therefore the reservation of water sufficient to raise crops and provide food must be implied. Fish was a traditional food source of Washington Indians. *Winans, supra.* Since the natural supplies of fish have been reduced by events beyond the Tribe's control, it is logical that they should seek other means to insure the availability of that food source. Under the *Winters* doctrine, a reservation of water may be implied only to the extent necessary to fulfill the purpose of the reservation. *Cappaert, supra.* Since the Lahontan trout are presently being propagated successfully in a federal hatchery in Winthrop and made available to the Tribe, the maintenance of spawning grounds in No Name Creek is not essential to insure the supply of that fish to the reservation Indians. The purpose for which the reservation was created would not be defeated if this Court does not imply a reservation for the spawning grounds so long as the hatchery spawn is available to the Tribe. Therefore, a reservation of water for such use will not be implied at this time. *New Mexico, supra.*

This Court finds that 1000 acre feet per year of water are available in No Name Creek Basin in an average year and that a total of 666.4 acre feet of water are reserved to the members of the Tribe for potential irrigation of the Indian-held allotments. Defendants Walton may divert water in excess of the reserved waters being used by the Tribe in any given year, with a priority date of actual appropriation. Since only 428.8 acre feet per year of the reserved amount is presently being used, 571.2 acre feet per year are available for appropriation. At such time as the Tribe requires its full reserved amount, less water will, of course, be available for appropriation. Should the amount of available water be less in any year than is required to fulfill the needs of the parties, the reserved rights of the

tribe, having a priority date as of the creation of the reservation, must be first fulfilled before Waltons' appropriative rights may be exercised.

EFFECT OF STATE WATER PERMITS WITHIN THE RESERVATION

The Tribe and the United States contend that the State of Washington has no authority to issue permits for appropriation of water within the reservation for use on lands within the reservation, and that permits issued to Waltons are null and void. The Tribe and the United States differ in opinion, however, concerning who utimately holds such authority. The United States claims exclusive federal jurisdiction to regulate reservation waters. The Tribe claims that the power vested in the Secretary of Interior under 25 U.S.C. §381 is not exclusive and that the Tribe itself has inherent power to regulate its own waters.

Although Congress has plenary power over Indian reservations, *see McClanahan, supra,* 411 U.S. at 172, n. 7, not all state jurisdiction over reservation lands has been barred. *See, e.g., New York ex rel. Ray v. Martin,* 326 U.S. 496 (1946); *DeCoteau, supra,* 420 U.S. at 427, n. 2. Under the test set out in *Williams v. Lee,* 358 U.S. 217, 220 (1959), a state may exercise jurisdiction within the exterior boundaries of an Indian reservation where Congressional legislation has not preempted this power and where to do so would not interfere with the tribe's right to self-government. Land within the exterior boundaries of the reservation held in fee by a non-Indian, such as the Walton land, is still considered part of the reservation. *Seymour v. Superintendent,* 368 U.S. 351 (1962). As to such non-Indian lands within the reservation

> [b]oth the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

McClanahan, supra, 411 U.S. at 179.

In applying the *Williams v. Lee* test the Court finds no

definitive action of Congress preempting state jurisdiction, although legislation set out some limitations to its exercise. The General Allotment Act provided that the Secretary of Interior could act to assure just and equal distribution of water among the Indians residing on the reservations where water was necessary for irrigation. 25 U.S.C. §381. The Act did not speak to division of water among non-Indian successors to allottees' interests. It did provide, however, that upon issuance of a fee patent, the allotment was to become subject to all civil and criminal laws of the state in which it was located. 25 U.S.C. §349. Another Congressional Act, Public Law 83-280, requires certain states, and permits other states, to assume civil and criminal jurisdiction over Indian reservations. This Act, however, does not govern jurisdiction over regulation of excess reservation waters. The Act states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

25 U.S.C. §1322(b).

A state attempt to interfere with the distribution of the Indians' reserved waters would conflict with the above mentioned federal statutes. However, where the State issues a water permit for irrigation of fee land owned by a non-Indian, and the permit is subject to existing rights, including all Indian reserved rights, the State action is not contrary to any jurisdiction preempted by the Federal Government. Such a permit does not alienate, encumber, or tax the Indian property interests as prohibited by 25 U.S.C. §1322(b).

The other prong of the *Williams v. Lee* test requires

this Court to determine whether state action in issuing water permits infringes on the Tribe's right to self-government. The Court concludes that the state action does not so infringe.

In 1948-50 when the State initially issued the Walton permit, the State did not infringe on the Tribe's right to self government because neither the Tribe nor the Secretary of Interior were exercising any authority over No Name Creek waters. The Tribe at that time was not using any No Name Creek waters to irrigate Indian lands. The Secretary of Interior had not issued regulations to distribute waters in the Valley, and the Tribe had not exercised any inherent authority to regulate water use.

More recently the Tribe enacted a Tribal Water Code which the Tribe asserts constitutes a preemption of jurisdiction preventing the state from continuing to exercise regulatory jurisdiction over water on non-Indian lands. *See Fisher v. District Court*, 424 U.S. 382 (1976). If the Tribe has the power to regulate all water on the reservation, then after the enactment of the Tribal Code, state regulation of waters within the reservation indeed would amount to infringement. *Confederated Tribe of Colville Indian Res. v. State of Wash.*, 412 F. Supp. 651 (E.D. Wash. 1976).

Indian tribes do possess "a certain degree of independent authority over matters that affect the internal and social relations of tribal life." *United States v Mazurie*, 419 U.S. 544, 557 (1975). Distribution of reservation waters among tribal members qualifies as a matter affecting the internal relations of tribal life, and thus the Tribe must enjoy independent authority to regulate tribal waters, with the Secretary of Interior pursuant to 25 U.S.C. 381 having concurrent jurisdiction to assure that the water is divided in a just and equal manner among the Indians on the reservation.

Whether the Tribe's independent authority extends to regulation of non-reserved water to be used on fee lands owned by non-Indians within the reservation is a more difficult issue. The United States has long recognized and upheld title to water rights perfected under local law. *See*

Jennison v. Kirk, 98 U.S. 453 (1879); Act of July 26, 1866, ch. 262, 14 Stat. 251, amended in Act of July 9, 1870, ch. 235, 16 Stat. 217. In 1877 Congress enacted the Desert Land Act, ch. 107, 19 Stat. 377, which permitted water from public lands to be appropriated under state and local law. See *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 160-63 (1935). This Act did not relinquish the authority of Congress to reserve unappropriated water for use on lands withdrawn from the public domain. *Arizona v. California*, 373 U.S. at 597-98. Where water on a federal reservation was not explicitly reserved and is required for a secondary use, however, the Supreme Court has inferred that "Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator." *New Mexico, supra*, 46 U.S.L.W. at 5012. Thus, where water is not explicitly or impliedly reserved, it must be appropriated under state water laws even when needed by the Federal sovereign for a federal reserve. *Id.*

If the Federal sovereign does not control unappropriated reservation waters claimed for non-reserved uses, and must claim water for such uses under state law, it follows that Indian tribes must be similarly limited. Because the tribal jurisdiction over water is thus restricted to the regulation of reserved water, state jurisdiction over excess waters will not infringe on the Indians' right to self government.

This Court accordingly finds that the State's issuance of permits for appropriation of excess waters on the reservation does not invade power preempted by federal legislation and does not infringe on the Tribe's right to self government. The Court therefore holds that the State of Washington has jurisdiction over the non-reserved waters within the Colville Reservation and that the Colville Tribal Water Code must be limited to regulation of reserved waters.

This Memorandum Opinion shall constitute the Court's findings and conclusions.

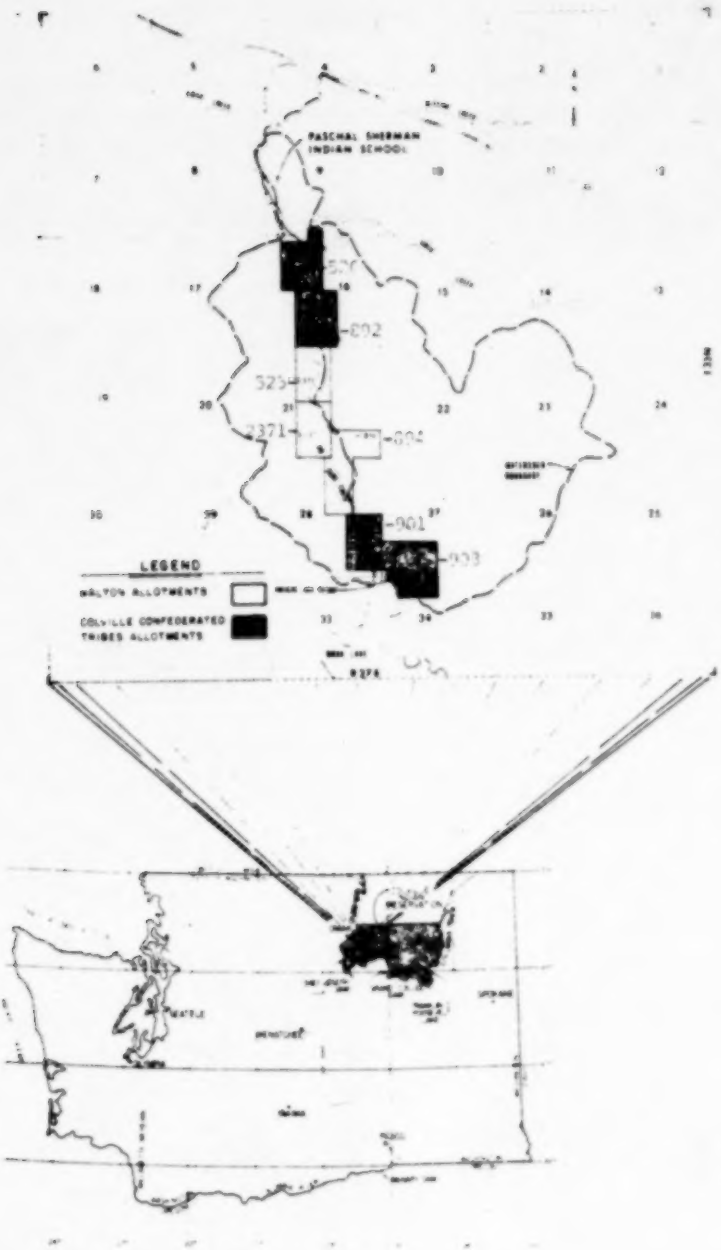
An appropriate order will be entered herein in conformance with this opinion. Each party shall, within

twenty days, submit and serve a proposed form of order for the Court's consideration.

The Clerk shall serve copies of this Memorandum Opinion by mail upon counsel of record.

DONE BY THE COURT this 9th day of October, 1978.

/s/ MARSHALL A. NEILL
UNITED STATES DISTRICT JUDGE



INDEX MAP OF THE NO NAME CREEK BASIN

APPENDIX

The parties have stipulated to the following facts:

1. Plaintiff tribe is an Indian tribe recognized as such by the Secretary of the Interior.

2. Plaintiff United States is the legal owner of the trust lands within the exterior boundaries of the Colville Indian Reservation for the benefit of the tribe.

3. Defendants Boyd Walton, Jr., and Kenna Jeanne Walton, his wife, and Wilson Walton and Margaret Walton, his wife, are owners in fee of approximately 350 acres of land located within the exterior boundaries of the Colville Indian Reservation. Waltons are mesne grantees of these lands for which the United States had issued fee simple patents. The Walton defendants are not Indians.

4. Defendant State of Washington, through its Department of Ecology, is the state entity having the authority and obligation to administer and enforce the ground and surface water codes (R.C.W. 90.03 and 90.44) of the State of Washington.

5. The lands presently within the boundaries of Colville Indian Reservation were included within the lands ceded to the United States of America by Treaty with Great Britain on June 15, 1846.

6. The original Colville Reservation was created from the public domain by Executive Order of President Grant on July 2, 1872.

7. The State of Washington was admitted to the United States on November 11, 1889, and the Colville Reservation is within the boundaries of said state.

8. The north half of the original Colville Reservation was restored to the public domain by Act of July 1, 1892 (27 Stat. 62).

9. The south half, or "diminished" Colville Reservation, as presently existing, is located in Okanogan and Ferry Counties, Washington.

10. An Act of March 22, 1906 (34 Stat. 80) provided for the sale and disposition of unallotted lands on the diminished reservation. Pursuant to that Act, President Wilson, by Proclamation of May 3, 1916 (39 Stat. 1778),

declared the non-mineral unallotted and unreserved lands within the diminished Colville Reservation open to entry and settlement under the provisions of the homestead laws.

11. By order of September 19, 1934, Secretary of the Interior Ickes withdrew all undisposed-of or surplus land of the diminished Colville Reservation from all forms of entry or disposal under the public land laws of the United States.

12. In an election on April 6, 1935, a majority of the Colville Indians voted to exclude themselves from the operation of the Indian Reorganization Act of 1934. (25 U.S.C. 461 et. seq.). However, the order of the Secretary of September 19, 1934 withdrawing lands from entry was not revoked.

13. By Act of July 24, 1956 (70 Stat. 626), Congress, among other things, restored the undisposed-of lands within the diminished Colville Reservation to the beneficial ownership of the tribe.

14. No Name Creek is a small, non-navigable stream the surface flow of which arises from springs located on and immediately adjacent to the northerly portion of the fee lands owned by defendants Wilson and flows in a southerly direction across Waltons' lands, allotted Indian land and tribal lands where it enters Omak Lake.

15. The lands adjacent to the northerly boundary of Waltons' land are designated as Trust Allotment No. 892 (the Peters allotment). The United States is legal owner, as trustee, of said Trust Allotment.

16. After traversing the Waltons' land, No Name Creek enters upon and traverses lands designated as Trust Allotment No. 901 (the Mary Ann or Yatkanolx allotment), where the water course crosses a granite lip. The United States of America is the legal owner, as trustee, of said Trust Allotment.

17. After traversing Trust Allotment No. 901, No Name Creek enters Trust Allotment 903 (the Edwards allotment). The United States of America is the legal owner, as trustee, of said Trust Allotment.

18. In a state of nature, No Name Creek entered Omak Lake within Trust Allotment 903. However, at the

present time, the creek flows into Omak Lake by an artificial channel across lands adjacent to Trust Allotment 903, which lands are held by the United States of America as trustee for the Colville Tribes as tribal lands.

19. Omache Lake Resort, operated by the Colville Confederated Tribes, is located on the tribal lands adjacent to Trust Allotment No. 903 and abutting Omak Lake.

20. Waltons lands have been developed by the Waltons as a homesite and for the operation of a dairy farm. 102 acres thereof are now under irrigation.

21. Waltons use the subject water for domestic, stock water and irrigation purposes. This water is obtained from wells on their land and by diversion from No Name Creek.

22. The 350 acres of land now owned by the Waltons are former trust allotments Nos. 525, 2371, and 894. These former trust allotments were transferred from trust to non-trust status by patents issued by the United States of America as follows:

(a) Allotment No. 525 was allotted to Alexander Smitaken by trust patent. On August 10, 1925, a fee simple patent was issued by the United States to Hattie Justus Wham, removing the property from trust status.

(b) Allotment No. 2371 was issued to George Alexander Smitaken by trust patent dated April 7, 1917. On January 28, 1921, a fee simple patent was issued by the United States to Paul Smitaken, removing the property from trust status.

(c) Allotment No. 894 was allotted to William George by trust patent dated April 7, 1917. On May 5, 1923, a fee simple patent was issued by the United States to Hattie Justus Wham, removing the property from trust status.

23. Waltons acquired title to these 350 acres by deed dated July 16, 1948.

24. On August 24, 1948, defendant Wilson Walton filed an application with the Washington State Department of Hydraulics, predecessor agency of the State Department of Ecology, for a permit to divert water from No Name Creek for the purpose of irrigation. On November 28, 1949, the Supervisor of Hydraulics issued a permit to Wilson

Walton to divert 1.0 cubic feet per second of water from No Name Creek to irrigate 75 acres of land.

25. On August 25, 1950, pursuant to Walton's application the state Supervisor of Hydraulics issued a Certificate of Water Rights to defendant Wilson Walton for the diversion of 1.0 cubic feet per second of water from No Name Creek for the irrigation of 65 acres of land.

26. At the time the state Supervisor of Hydraulics issued the foregoing certificate, there was no diversion of water from No Name Creek basin other than by defendant Walton.

27. Subsequent to the commencement of action No. 3421 by the Colville Confederated Tribes, the tribe started a program for the development of underground waters on tribal and trust lands lying north of Waltons' lands.

APPENDIX B

MEMORANDUM OPINION

[February 9, 1979]

No. C-3421

COLVILLE CONFEDERATED TRIBES, Plaintiff,

vs.

BOYD WALTON, JR. et ux, et al., Defendants.

STATE OF WASHINGTON, Defendant-Intervenor,

No. C-3831

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM BOYD WALTON, et ux, et al., and THE STATE OF WASHINGTON, Defendants.

Sub judice is plaintiff Tribe's Motion to Amend the Findings of Fact in the Court's October 25, 1978 Memorandum Opinion. The Tribe objects to the Court's finding that the northernmost allotment (S-526) was historically irrigated by waters from Omak Creek; objects to the omission of the irrigable acres of that allotment from the calculations of water reserved from the No Name Creek Basin; and asks for reconsideration of the quantification of water and of the average water duty.

This Court is convinced that there was sufficient evidence in the record on which to base all of its findings. Whether irrigation of allotment S-526 from Omak Creek actually occurred is irrelevant, however, to this Court's decision that S-526 irrigation water not be adjudicated as being reserved from No Name Creek Basin at this time. While S-526 lies within the No Name Creek Basin, surface waters of Omak Creek also traverse the allotment. Where irrigable acreage having the right to *Winters* reserved

waters lies so obviously within two water systems, for a court to grant reserved water rights for that acreage from one water system without consideration of the availability of water from the other system would be unjust.

A present denial of the request to include allotment S-526 in the quantification of the reserved waters in No Name Creek Basin does not preclude this Court from considering a future petition to recalculate the quantity of reserved water in the Basin. Just as the United States or the Tribe may later show the need for reserved water to maintain the Lahotan trout should the hatchery fish become unavailable, the Tribe may later show that Omak waters are insufficient, unavailable, or uneconomical to satisfy all of the reserved water needs of allotment S-526.

The Tribe, having reserved rights to Omak Creek water as well as that of No Name Creek, should have priority over non-reserved users. Therefore, until such time as rights to Omak Creek waters are also adjudicated, this Court cannot determine from which source irrigation water for allotment S-526 must come. The fact that the Tribe is presently using No Name water to irrigate S-526 is not relevant to this Court's decision. The Tribe installed its present irrigation system pumping No Name Creek Basin groundwater from allotment H-892 north to S-526 pursuant to testing orders issued by this Court. The system was installed at the Tribe's own risk with full knowledge that it would not be a determinative factor in this present litigation. Therefore, plaintiff's motion to amend is DENIED.

All remaining pending motions are DENIED.

IT IS SO ORDERED.

DONE BY THE COURT this 9th day of February, 1979.

/s/ MARSHALL A. NEILL
UNITED STATES DISTRICT JUDGE

APPENDIX C

JUDGMENT

[February 9, 1979]

No. C-3421

COLVILLE CONFEDERATED TRIBES, Plaintiff,

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vs.

WILLIAM BOYD WALTON, et ux, et al., and THE STATE OF WASHINGTON, Defendants.

The Court having heretofore entered its Memorandum Opinion containing its findings and conclusions, now therefore, in accordance therewith, it is

ORDERED and DECREED

I.

At the present time, the United States of America is the legal owner of a water right with a priority date of 1872 to the surface and ground waters of No Name Creek Basin for the benefit of the Indian allottees of Allotments 901, 903 and 892, and for the benefit of the Tribe for 9.5 acres of unallotted Tribal Trust Lands west of Colville Allotment No. 901 and .8 acres of Tribal Trust Lands west of Colville Allotment No. 892. The water duty for irrigation of the irrigable acres on the allotments and Tribal Trust Lands is 4.0 acre-feet per acre. The total reserve waters for irrigation of the above lands is as follows:

ALLOTMENT	DIVERSION DUTY PER ACRE	IRRIGABLE ACREAGE	TOTAL IN ACRE-FEET
901	4.0	41.1	164.4
903	4.0	57.3	229.2
892	4.0	57.9	231.6
Tribal Lands	4.0	10.3	41.2
TOTAL	4.0	166.6	666.4

II.

While Allotment No. 526 also lies within the No Name Creek Drainage Basin, it has a potential alternate source for irrigation water, Omak Creek, which traverses the allotment. Until the availability, sufficiency and economy of using Omak Creek water for irrigation of Allotment No. 526 can be considered by this Court, no final adjudication of the source of water reserved for irrigation of Allotment No. 526 will be made. The duty for Allotment No. 526 is as follows:

ALLOTMENT	DIVERSION DUTY PER ACRE	IRRIGABLE ACREAGE	TOTAL IN ACRE-FEET
526	4.0	61.8	247.2

A total of 247.2 acre-feet of water must be available annually to irrigate Allotment No. 526. This Court does not determine at this time whether such water must come from Omak Creek, No Name Creek Basin or both.

III.

At the present time, use of the ground and surface waters of No Name Creek Basin is not necessary to maintain a Lahontan trout fishery in Omak Lake, and a reserved right to the waters of No Name Creek Basin for such purpose will be neither quantified nor implied at this time, although the United States of America or the Tribe may later assert a reserved water right for such use if and when such use is needed to fulfill the purposes of the Reservation.

IV.

The United States and the Colville Confederated Tribe have concurrent jurisdiction over those rights to use waters of No Name Creek impliedly reserved by the United States.

The Colville Tribal Water Code's application is limited to regulation of reserved waters, and the Secretary of Interior, pursuant to 25 U.S.C. §381, may act to assure that there is a just and equal distribution of the reserved waters among the Indians entitled to their use.

V.

The State of Washington has jurisdiction over the non-reserved waters within the Colville Indian Reservation.

The State of Washington has authority to apply its water right laws and to establish water rights pursuant thereto, with respect to waters which are presently in excess of those required to satisfy any reserved water rights held by the United States for the Tribe and its members.

VI.

Upon purchase of their lands within the No Name Creek Basin, the defendants Walton did not acquire a right to share in the waters reserved by the United States of America for the benefit of the Colville Confederated Tribes and its members. They did succeed to a right to the use of waters of No Name Creek Basin to irrigate 32 acres of land with a priority date of actual appropriation of water for that use, PROVIDED, HOWEVER, that such water right is subject to prior reserved right to the use of such waters held by the United States for the benefit of the Colville Confederated Tribes and its members.

VII.

In order to perfect the above rights and to acquire further rights to the use of ground and surface waters of No Name Creek Basin the defendants Walton must proceed in accordance with the laws of the State of Washington,

PROVIDED, HOWEVER, any rights to the use of water acquired by the defendants Walton shall be subject to the prior reserved right to the use of water held by the United States for the benefit of the Tribe and its members.

VIII.

The State of Washington has the right and authority to issue permits to non-Indians for the use of waters within the Colville Indian Reservation in accordance with the provisions of the law of the State of Washington, PROVIDED, HOWEVER, that any use of water authorized by the State is subject to the prior reserved right to the use of water held by the United States for the benefit of the Tribe and its members.

IX.

One thousand acre-feet of water should be available in the Basin in an average year. Should the amount of water available in No Name Creek Basin be less in any year than is required to fulfill the needs of the parties, the reserved rights to the use of water held by the United States for the benefit of the Colville Confederated Tribes and its members, having a priority date as of the creation of the Reservation, must be first fulfilled before the appropriative rights of the defendants Walton may be exercised.

X.

The issuance by the State of Washington of the permit and certificate for the use of waters within No Name Creek to defendants Walton was a valid exercise of authority by the State as to water in excess of waters reserved by the United States for the benefit of the Tribe and its members.

XI.

The requests of plaintiffs for orders declaring all permits and certificates issued by the State of Washington for the use of water within the Colville Indian Reservation to be null and void and that the State be enjoined from

issuing further permits or certificates for the use of water within the Colville Indian Reservation are DENIED.

XII.

All parties are permanently enjoined from attempting physically to interfere with the others' beneficial use of water as authorized by this Order.

XIII.

All parties utilizing water for any purpose whatsoever in the No Name Creek Basin, excluding domestic uses, shall monitor and measure the amount of water put to beneficial use with accurate and approved recording data approved by the United States Geological Survey. The United States Geological Survey shall have the right to enter upon lands of any of the parties at any reasonable time for the purpose of maintaining accurate records for the reasonable implementation of this Order.

XIV.

The damage claims asserted by defendants Walton against the United States of America and the State of Washington are dismissed.

XV.

Each party shall bear its own costs.

DONE BY THE COURT this 9th day of February, 1979.

/s/ MARSHALL A. NEILL
UNITED STATES DISTRICT JUDGE

APPENDIX D

FINDINGS AND CONCLUSIONS AND ORDER DENYING PETITION OF COLVILLE CONFEDERATED TRIBES FOR A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

[July 17, 1979]

No. C-3421

COLVILLE CONFEDERATED TRIBES, Plaintiff,

vs.

BOYD WALTON, JR. et ux, et al., Defendants.

STATE OF WASHINGTON, Defendant-Intervenor,

No. C-3831

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM BOYD WALTON, et ux, et al., and the STATE OF WASHINGTON, Defendants.

This matter came on for hearing on May 31, June 4, and July 16, 1979, on the petition filed May 22, 1979 by Colville Confederated Tribes, a plaintiff in the above-entitled and numbered actions for a temporary restraining order and temporary injunction, and on the other petitions and motions disposed of below. Having received and reviewed testimony, exhibits, affidavits, briefs, memoranda, and arguments, and being fully informed, the Court makes the following findings and conclusions in disposing of the petition:

1. In examining the Memorandum Opinion of October 25, 1978 (reported at 460 F. Supp. 1320), as incorporated in and together with the Judgment of the Court dated February 9, 1979, the Court finds and concludes that:

a. Plaintiff Colville Confederated Tribes have a right presently protected for beneficial use during 1979 in a total amount of 428.8 acre-feet of waters in the No Name Creek Basin.

b. Subject to the above (1.a.), defendants *Walton* have a right presently protected for beneficial use during 1979 in a total amount of 260.0 acre-feet of waters in the No Name Creek Basin.

c. Plaintiff Colville Confederated Tribes may, at its election, use a portion of the aforementioned right to 428.8 acre-feet for irrigation of allotments 526, 892, 901 and 903, as well as for beneficial uses other than irrigation, including use for Lahontan trout spawning in the lower reach of No Name Creek.

d. During 1979 waters excess to the aforementioned 688.8 (428.8 + 260.0) acre-feet are subject to the jurisdiction of the State of Washington for allocation and are available for allocation, pursuant to state law, to any applicant for such excess waters.

e. Waters in the No Name Creek Basin, both surface and ground, may be used to satisfy the aforementioned rights of the Tribes and Waltons presently protected for use in the No Name Creek Basin. When the Tribes divert said waters, by withdrawing ground waters of the Basin, and place the waters in the natural channel of No Name Creek, which thereafter traverses lands of defendants Walton, no right attaches to the waters so placed except when the Tribes specify a portion thereof for a beneficial use relating to the irrigation of allotments 901 or 903 or Lahontan trout spawning purposes.

f. Defendants Walton are entitled to divert any waters within No Name Creek as they cross lands owned by those defendants to satisfy rights confirmed to the defendants in the Judgment of February 9, 1979, whether the waters are naturally occurring or pumped by plaintiff Tribes, or a combination thereof; however, where pumped waters are specified by the Tribes for beneficial uses only for irrigation of allotments 901 or 903 or Lahontan trout fishery, and are not in excess of the maximum amount of 428.8 acre-feet duty of water as described in Section 1.c.,

supra, or are authorized for diversion or withdrawal by the State of Washington as provided in Section 1.e., *supra*, the defendants Walton shall not interfere with the delivery of any ground waters placed in the Creek by the Tribes designated for beneficial use downstream. Any such water diverted by defendants Walton shall not be chargeable to the 428.8 acre-feet of waters so allocated to the Tribes.

g. The doctrine of "developed waters" does not apply to those waters withdrawn from the aquifer underlying No Name Creek Basin and placed in the No Name Creek channel by plaintiff Tribes.

2. Plaintiff Tribes has not shown that it will suffer any irreparable harm or injury from water withdrawals and diversions made by defendants Walton, or that an injunction is justified.

3. Appointment of a special watermaster is necessary because of the inability of the parties herein to agree on a mutually acceptable allocation of waters for use for the remainder of the 1979 irrigation season.

Pursuant to the foregoing findings and conclusions, it is ORDERED AND DECREED as follows:

1. That the following petitions and motions are denied:

a. Petition for Temporary Restraining Order and Preliminary Injunction, made by plaintiff Tribes;

b. Motion for Stay of June 4, 1979 Ruling, made by plaintiff Tribes;

c. Motion to Allow Both Parties to Continue Present Operations, made by plaintiff Tribes;

d. Renewed Petition for Preliminary Injunction against Defendants/Appellants Walton, made by plaintiff Tribes;

e. Motion for Issuance of Writ of Assistance, made by defendants Walton.

2. That the Motion to Amend Renewed Petition, etc., made by plaintiff Tribes, is granted.

3. That the plaintiff Colville Confederated Tribes limit its withdrawals from No Name Creek Basin waters, both surface and ground, for beneficial uses during 1979 to a cumulative total of no more than 428.8 acre-feet, unless

authorized by the State of Washington to withdraw waters in excess of the 428.8 acre-feet.

4. That the defendants Walton limit their withdrawals from No Name Creek Basin waters, for beneficial uses during 1979, to a cumulative total of no more than 260.0 acre-feet, unless authorized by the State of Washington to withdraw waters in excess of the 260.0 acre-feet.

5. That any party wishing to withdraw and use for its benefit more than the aforementioned amounts of water for the 1979 irrigation season shall apply to the State of Washington for the approval of said withdrawals, such approval to be obtained by means of temporary permits (or authorizations as may be authorized by state law) issued by the State of Washington, Department of Ecology, pursuant to state water rights laws. The State is directed, in considering and passing on applications for the use of surface or ground waters referred to herein, to accept and process permit applications from both the defendants Walton and the Colville Confederated Tribes, including from individual tribal members and any tribal organization.

In ruling upon such applications, the Court urges the State to allocate excess waters in a fashion which minimizes, to the maximum extent practicable, losses to existing agricultural plantings and Lahontan trout occasioned by lack of water.

6. That plaintiff Colville Confederated Tribes and defendants Walton meter their withdrawals and diversions of water and submit reports thereon at least weekly to this Court, the United States Geological Survey, and the special watermaster appointed by this Court.

7. That Mr. George Neff of Ephrata, Washington, is appointed as the special watermaster for the No Name Creek Basin for the purpose of regulating all authorized uses of waters, surface and ground, by parties to this action. Authorized uses are those uses authorized by this Order, or hereafter authorized by the State of Washington. All orders, commands, and other regulatory actions of the watermaster are to be complied with as orders, commands,

and regulatory actions of this Court itself. Any order of the watermaster may be reviewed by this Court on the request of any of the parties herein through the filing of a petition with the Court. The appointment of Mr. Neff is conditioned on his approval of the appointment.

8. That the watermaster shall install, or direct the installation of, proper metering devices on all diversions and withdrawals, as he deems necessary. In this, as in the conduct of all of his duties, he may rely on the support of the services of the U.S. Geological Survey, which shall continue its present data gathering and reporting activities. The cost of purchase and installation of metering devices shall be borne by the party whose withdrawal is thereby metered.

9. That the watermaster shall be compensated by the United States.

Dated: July 17, 1979.

/s/ DONALD S. VOORHEES
United States District Judge

PRESENTED BY:

/s/ CHARLES B. ROE, JR.
Sr. Assistant Attorney General

/s/ ROBERT E. MACK
Assistant Attorney General

Attorneys for State of Washington.

APPENDIX E

OPINION

[August 20, 1980, later withdrawn by
Ninth Circuit Court of Appeals]

No. 79-4297

COLVILLE CONFEDERATED TRIBES, Plaintiff/Appellant,

vs.

BOYD WALTON, JR., et ux, et al., Defendants/Appellees,

and

STATE OF WASHINGTON, Intervening Defendant/Appellee

No. 79-4309

UNITED STATES OF AMERICA, Plaintiff/Appellee,

vs.

WILLIAM BOYD WALTON, et ux, Defendants/Appellants,

and

STATE OF WASHINGTON, Defendant.

No. 79-4383

UNITED STATES OF AMERICA, Plaintiff/Appellee,

vs.

WILLIAM BOYD WALTON, JR., et ux, Defendants,

and

STATE OF WASHINGTON, Defendant/Appellant.

Appeal from the United States District Court for the
Eastern District of Washington

[Argued and Submitted June 6, 1980]

Before: WRIGHT and SKOPIL, Circuit Judges, and CURTIS, Senior District Judge.*

WRIGHT, Circuit Judge:

Walton and the Colville Confederated Tribes are competing for the right to use water in No Name Creek. Three issues are presented: (1) does the non-Indian purchaser of an Indian allotment acquire the Indian's reserved water rights; (2) what is the scope of the Indians' reserved rights; and (3) may a State allocate surplus reservation water among non-Indians?

We first put these issues in perspective.

HISTORY OF INDIAN LAW

Nineteenth century federal policy was to isolate the Indians on reservations. The government forced these "weak and defenseless people" onto large tracts of land that it held for them in trust.[1] *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)).

Toward the end of the century, Congress changed federal Indian policy from one of isolation to one of assimilation. The Indians were to learn farming and to be integrated into non-Indian society. Pursuant to the General Allotment Act of 1887, individual Indians were granted parcels of reservation land in fee.[2] 24 Stat. 388, (1887) (codified at 25 U.S.C. §§ 331, 334, 348, 349, 381 (1976)). Unallotted reservation land was then opened for entry and settlement. *See, e.g.*, Act of May 29, 1908, Pub. L. No. 60-157, ch. 217, 35 Stat. 458; Act of Mar. 22, 1906, Pub. L. No. 59-61, ch. 1126, 34 Stat. 80.

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*Of the Central District of California

[1] *See* J. Kinney, *A Continent Lost — A Civilization Won* 27-80 (1975); U.S. Dep't. of the Interior, *Federal Indian Law*, 152-57 (1958).

[2] The Allotment Act responded to complex pressures. Westward expansion had recently been completed and the pressure of land hungry settlers on Indian lands was increasing. For some, the Act was a means to open new land for settlement. For others, it seemed the only way to protect the Indians from complete landlessness. It also was designed to promote individualism, industry and other values regarded as civilized. *See* D. Otis, *The Dawes Act and the Allotment of Indian Lands*, 8-32 (2nd ed. 1973).

Nearly 50 years later, Congress retreated from the policy of assimilation. Undistributed reservation lands were returned to trust status and tribal self-government was encouraged under the Indian Reorganization Act of 1934. Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (1934) (codified in scattered sections following 25 U.S.C. § 461 (1976)).

HISTORY OF THE COLVILLE RESERVATION

In 1871 the predecessors of the Colville Confederated Tribes had no treaty with the United States and, consequently, no reservation.[3] These Indians were contemporaneously described as "good farmers, [who] raise extensive crops, make good improvements, and own stocks of cattle and horses." [1871] *Report of the Commissioner of Indian Affairs*, 277.

After the Civil War, settlers had begun to encroach on Indian lands. The Farmer in Charge at Fort Colville reported that violence was likely unless a reservation was established to protect the Indians' interests. *Id.* In response to a request from the Commissioner of Indian Affairs, President Grant created the Colville Reservation. Executive Order of July 2, 1872, *reprinted in* 1 Kapler, *Indian Affairs, Laws and Treaties*, 915-16. (2d ed. 1904).[4] Twenty years later, the northern half of the reservation was taken from the Indians and opened for entry and settlement.[5]

In 1906 Congress ratified an agreement with the Colvilles which provided for distribution of reservation lands to the Indians pursuant to the Allotment Act and for disposition of the remainder by entry and settlement. Act of

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[3]The Colville Confederated Tribes included the Methow, Okanogan, Sampoil, Nespelem, Lake, and Colville Tribes. *See, Confederated Tribes of the Colville Reservation v. United States*, 4 Ind. Cl. Comm. 151 (1956); I. Kappler, *Indian Affairs and Treaties*, 915 (2d ed. 1904). In this opinion, they will be referred to as the Tribe or the Colvilles.

[4]Indians who did not live on the land reserved for them were compelled to leave valuable tracts on which they had made extensive improvements and move to the reservation. [1872] *Report of the Commissioner of Indian Affairs*, 62.

[5]Approximately 1.5 million acres were returned to the public domain. Act of July 1, 1892, 27 Stat. 62.

Mar. 22, 1906, Pub. L. No. 59-61, ch. 1126, 34 Stat. 80. The agreement was effectuated by Presidential proclamation in 1916.[6] 39 Stat. 1778.

In 1917, a row of seven allotments was created in the No Name Creek watershed. Walton, a non-Indian, now owns the middle three, numbers 525, 2371 and 894.[7] The United States holds the others in trust for the Colville Indians. Allotments 526 and 892 are north of Walton's property and allotments 901 and 903 are south. Allotments 892, 901 and 903 are held for heirs of the original allottees, but the Tribe has a long-term lease. Allotment 526 is beneficially owned by the Tribe.[8] *See Appendix, a map of the area.*

NO NAME CREEK WATER SYSTEM

No Name Creek is a small spring-fed creek which flows south into Omak Lake. The lake has no outlet and is saline. The No Name hydrological system, consisting of an underground aquifer and the creek, is located entirely on the Colville Reservation.

The aquifer lies under the Indians' northern allotments and the northern tip of Walton's allotment, number 525. No Name Creek originates on the southern tip of the Indians' allotment number 892 and flows through Walton's allotments and the Indians' southern allotments.

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[6]The reservation remained open for settlement until 1934, when the Secretary of the Interior "temporarily" withdrew the surplus lands pursuant to the Reorganization Act. Congress permanently restored those lands to the beneficial use of the Tribe in 1956. Act of July 24, 1956, Pub. L. No. 84-772, ch. 684, 70 Stat. 626. In passing that Act, Congress acknowledged that the Indians' consent to opening the reservation for settlement was of questionable validity. *See* H.R. Rep. No. 2080, 84th Cong., 2nd Sess. 2 (1956).

[7]He bought the allotments in 1948 from an Indian who was not a member of the Tribe and who had begun to irrigate the land by diverting water for 32 acres from No Name Creek. He immediately procured a permit from Washington State to irrigate 65 acres by diverting up to 1 cu. ft. per second "subject to existing rights." Walton now irrigates over 100 acres.

[8]We assume that none of the Colvilles' allotments ever passed from Indian ownership.

FISHING GROUNDS

Salmon and trout were a traditional food for the Colville Indians, but the salmon runs have been destroyed by dams on the Columbia River. In 1968, the tribe, with the help of the Department of the Interior, introduced Lahontan cutthroat trout into Omak Lake. The species thrives in the lake's saline water, but needs fresh water to spawn. The Indians cultivated the creek's lower reach to establish spawning grounds but irrigation use depleted the water flow during spawning season. The federal government has given the Indians fingerlings to maintain the stock of trout.

THE CASE BELOW

In 1970 the Indians sued Walton, alleging that his use of No Name Creek water violated their rights.

The trial court calculated that the Indians have a potential right to 912 acre feet of water to irrigate their 228 irrigable acres but refused to award water from the No Name system for their northernmost allotment, number 526, until they showed that water for it was unavailable from another source, Omak Creek. The Indians' right to No Name water was therefore reduced to 666.4 acre feet.

The court found that the Indians were irrigating only 107.2 of the irrigable acres on their other three allotments. This left an additional 237.6 acre feet available for appropriation by non-Indians, subject to the Indians' superior right.

The court also held that the Indians were potentially entitled to use water to propagate trout but refused to award water for that purpose. It concluded that spawning was unnecessary because fingerlings were provided free by the federal government.

By post-trial motion, the Indians sought permission to use some of their irrigation water for trout spawning. The motion was granted and the Tribe has since pumped aquifer water from their wells into No Name Creek during spawning season.

Finally, the court decided that Washington state could

regulate No Name water that was not reserved for the Indians or that they were not using.

Walton, the Tribe and the State appeal parts of the decision. *Colville Confederated Tribes v. Walton*, 460 F.Supp. 1320 (E.D. Wash. 1978).[9]

Judge Neill's analysis reflects his extensive knowledge of the background and facts of this case and his thoughtful examination of the issues. We adopt his opinion and add the following analysis.

I. WALTON'S WATER RIGHTS

The primary issue is whether Walton acquired Indian reserved water rights with his allotments. We conclude that he did not for two reasons: (1) no water was originally reserved for non-Indian use and (2) the history and purpose of the Allotment Act demonstrates that Congress would not have intended non-Indians to acquire reserved rights.[10]

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[9]The Tribe asked the United States to intervene on its behalf. Instead, the Justice Department filed a separate suit against Walton, based on the theory that the Secretary of the Interior has exclusive jurisdiction over all the water on the reservation. The trial court consolidated the proceedings *sua sponte*. The United States filed an appeal from the decision and the Tribe moved "not to be bound" by any ruling on *U.S. v. Walton*, No. 79-4619. The United States has since dropped its appeal and we deny the Tribe's motion.

[10]In addition, some pragmatic considerations support our conclusion: (1) The government has greater control over the Indian's use of reserved water. A Congressional appropriation is usually necessary for any major Indian project because private financing is virtually unavailable. *See generally*, A. Sarkin, *American Indians and Federal Aid* (1971). Non-Indians might well be able to obtain private financing, however; (2) a large portion of most reservations is now owned by non-Indians. Transference of reserved rights would create serious problems among them. On the reservation, the appropriative system which, in some form, governs water rights in all the arid western states, would be eliminated and a quasi-riparian system instituted. For a discussion of riparian and appropriative systems, *see* W. Hutchins, *Water Rights Laws in the Nineteen Western States*, chs. 8, 10 (1977); (3) non-Indian reservation property owners could oust nearby off-reservation owners from their state-created water rights and, perhaps, allotment owners could oust other reservation owners whose title derives from a homestead. *See Colville Confederated Tribes v. Walton*, 460 F.Supp. 1320, 1328-29 (E.D. Wash. 1978).

THE WINTERS DOCTRINE

The Supreme Court held in 1908 that when the United States reserved federal land for the Indians, it impliedly reserved enough water to accomplish the purposes for which the reservation was created.[11] *United States v. Winters*, 207 U.S. 564, 576-77 (1908). Reserved water rights have priority from the date the reservation was created and, unlike water rights created under the laws of western States, expand to meet future needs.[12] *Arizona v. California*, 373 U.S. 546, 600-601 (1962).

In a recent case involving reserved forest lands, the Supreme Court declared that the *Winters* doctrine must be narrowly construed:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. New Mexico, 438 U.S. 696, 702 (1977).

We believe the *New Mexico* rule applies to non-Indian allotment owners. Indian reservations were created to isolate the Indians, to establish them in a homeland, and to convert them into a "pastoral and civilized people." *Winters v. United States*, 207 U.S. 564, 576 (1908). *See generally* J. Kinney, *A Continent Lost—A Civilization Won*, 27-80, (1975). Reserving water for non-Indians is not necessary to fulfill any of these purposes and is inconsistent with the basic nineteenth century Indian policy of isolation.

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[11]The *Winters* doctrine applies to reservations created by treaty or executive order. *Arizona v. California*, 373 U.S. 546, 598 (1963).

[12]For a general discussion of Western water rights law, *see* W. Hutchins, *Water Rights Laws in the Nineteen Western States* (1977), especially chs. 8, 10.

THE ALLOTMENT ACT

Even if the original reservation of water rights comprehended use by non-Indians, Congress has taken no action to transfer those rights to them.

Termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history. *See Mattz v. Arnett*, 412 U.S. 481, 504-505 (1972); *Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1975). The Allotment Act does not provide for the transfer of Indian water rights to non-Indian allotment purchasers. It was passed in 1887, over 20 years before the *Winters* doctrine was announced. Therefore, Congress could not have intended to provide for the transfer of reserved rights.[13]

The available evidence indicates that Congress would have disapproved transferability as inconsistent with the purposes of the Allotment Act. Permitting non-Indians to acquire reserved water rights could have only two effects: (1) to induce non-Indians to purchase allotments rather than to homestead off the reservation[14] and (2) to enable the Indians to sell their land for a higher price.[15] Each is inconsistent with the dominant purpose of the Allotment Act. Indians were given fee ownership principally so they could keep their land, make their homes on it, and become self-sufficient farmers.

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[13]The only reference to water rights in the Act is § 7:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations * * *.

25 U.S.C. § 381 (1976). This provision implies that water rights were held in federal trust and not allotted.

[14]Proponents of the Allotment Act hoped to integrate reservations so the Indians could learn farming skills from their non-Indian neighbors. *See, e.g.*, 17 Cong. Rec. 1762-63 (1886). Integregation could be accomplished by allowing non-Indians to homestead on the reservation. Encouraging the sale of allotments was unnecessary.

[15]The extra money could be considered additional capital. Senator Dawes declared that an Indian could sell his allotment and go into business. *Report of the Secretary of the Interior, Proceedings of*

This is evidenced by the provision that allotted lands be held in federal trust for 25 years. 25 U.S.C. § 348 (1976). Felix Cohen, in his authoritative *Handbook of Federal Indian Law*, states that Congress was motivated to maintain the trust relationship by

> the desire to protect the Indian against sharp practices leading to Indian landlessness, the desire to safeguard the certainty of titles, and the urge to continue an important basis of governmental activity [on the Indian's behalf].

F. Cohen, *Handbook of Federal Indian Law*, 221 (1940); U.S. Dept. of Interior *Federal Indian Law*, 788-89 (1958).

The extended trust period was established to give the Indians time to learn the agricultural skills necessary to make their land productive and to settle on it. Congress expected that, after 25 years, the threat of exploitation and Indian landlessness would have passed. *Report of the Secretary of the Interior, Proceedings of Mohonk Lake Conference*, H.R. Exec. Doc. No. 75, 49th Cong. 2d Sess. 993-94 (1887) (Senator Dawes' presentation). It would have been inconsistent for Congress to deter non-Indian acquisition of allotments by imposing a federal trust and yet to encourage non-Indian acquisition by offering better water rights than were available to homesteaders. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935) (patent issued under homestead law carries no water rights).

We conclude that Walton acquired no reserved water rights.[16] His rights are State-created and are therefore junior to the Indians' rights.[17]

Mohonk Lake Conference, H.R. Exec. Doc. No. 75, 49th Cong. 2d Sess. 993 (1887). Congress recognized that it could not force the Indians to become farmers, but it neither intended nor seriously considered the possibility that they might be become businessmen. The Act was intended to accommodate but not to facilitate their entrepreneurial ventures.

[16]Our decision is consistent with *United States v. Powers*, 305 U.S. 527 (1939). The *Powers* court expressly reserved the issue of transferability:

> We do not consider the extent or precise nature of respondents' [non-Indians'] rights in the waters.

Id. at 533.

THE INDIANS' WATER RIGHTS

The trial court found that 1,000 acre feet of water per year should be available from the No Name Creek system and that four acre feet per year are required to irrigate one acre of land. These findings are not clearly erroneous.

The court held that the Colvilles have a potential right to use 912 acre feet of water from the system, but deferred their right to use water for irrigation of allotment 526 and for trout propagation. We affirm that ruling.[16]

ALLOTMENT 526

There are two possible sources of water for the Indians' northernmost allotment, number 526: the No

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In *Powers*, the Indians and the government constructed a system to irrigate about 20,000 acres. When the reservation was subsequently allotted, some Indians received unirrigated land. A private irrigation company constructed another system which served both Indian and non-Indian owned allotments. The government sued to enjoin any diversion of water into this and other systems. The Court refused to grant that injunction declaring that the Indian allottees served by the private system has a right to water. *Id.* at 532. Our reading of *Powers* is based on a careful study of the District Court, Court of Appeals, and Supreme Court opinions.

In *United States v. Ahtanum Water Dist.*, 236 F.2d 321 (1956), this court said in dictum that *Powers*

> holds that white transferees of such fee patented Indian allotments were equally with individual allottees beneficially entitled to distribution of the waters diverted for the Indian irrigation system.

Id. at 342. That reading was erroneous.

[17]Appropriative rights acquired before the reservation was created have priority over reserved rights. *Winters v. United States*, 207 U.S. 564 (1908). Walton may "tack" on his predecessors', including any Indian's, period of continuous use, but the earliest diversion of water for his land was made by his grantor between 1942 and 1948.

[18]The Colville argue that water rights were not allotted but were kept in trust for them by the federal government, that individual Indian allottees have a right to share in the tribal right, and that this right is not diminished when allotments are sold to non-Indians. We reject this theory. The Tribe insists, in effect, that the Indians' water rights must be calculated on all the acres they ever owned, not on those they now own. In *California v. Arizona*, 373 U.S. 546 (1962), the Court calculated the quantity of water reserved for the Indians from the "practicably irrigable acreage." *Id.* at 600-601. If the Indians do not own the land it is not practicably irrigable by them.

Name aquifer and Omak Creek.[19] The trial court held that the Indians must use water from Omak Creek for allotment 526, if any is available, before they may pump water from the aquifer.

Winters, supra, 207 U.S. 546, gives the Indians a reserved right to water, but not the absolute right to determine the source. The Indians have not shown that water is unavailable from Omak Creek or that its use involves significant disadvantages.[20] Under the circumstances we find that the trial court properly required the Indians to seek water initially from Omak Creek for allotment 526.

TROUT PROPAGATION

The trial court held that maintaining fishing grounds was one purpose for which the Colville Reservation was created, but refused to grant water for spawning because it was unnecessary. We must first decide whether water was reserved for trout propagation and then whether its use is necessary.

Insofar as possible, we apply the *New Mexico* test to determine the scope of the Indians' water rights. *United States v. New Mexico, supra,* 438 U.S. at 702. We cannot define the purposes of an Indian reservation as narrowly as those of a national forest, however, for three reasons: (1) the specific purposes of an Indian reservation were often unarticulated;[21] (2) the general purpose, to provide a home

[19]Omak Creek and No Name Creek have no surface connection.

[20]The Indians are deprived of the use of wells drilled on allotment 526 but those were constructed with the understanding that this litigation would be unaffected.

[21]For example, the order creating the Colville reservation read:

> It is hereby ordered that * * * the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

Executive Order of July 2, 1872, *reprinted in* 1 Kappler, *Indian Affairs and Treaties,* 916 (2d ed. 1904). Reservations were commonly created with similar language. *See* U.S. Dept. of the Interior, *Federal Indian Law,* 613-22 (1958). The President's orders responded to requests from

for the Indians, is a broad one and must be liberally construed;[22] and (3) the reservation was created by the government for the Indians, not on its own behalf.[23] To identify the purposes of the Colville Reservation, we consider not only the document of creation, but the circumstances surrounding its creation and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances.[24] *See United States v. Winans*, 198 U.S. 371, 381 (1905).

The Colville Indians traditionally fished for both salmon and trout. Like other Pacific Northwest Indians,

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officers in the Department of the Interior but it is difficult to identify or to know how much weight to give to their purpose.

[22]*See United States v. Winans*, 198 U.S. 371, 381 (1905) and cases cited in fn. 24 *infra*. The rule of liberal construction should apply to reservations created by Executive Order. *See Arizona v. California*, 373 U.S. 546, 598 (1963). Also, Congress envisioned agricultural pursuits as only a first step in the "civilizing" process. *See, e.g.*, 11 Cong.Rec. 905 (1881). This vision of progress implies a flexibility of purpose.

[23]This reason has three aspects: (1) The principle of exempting the Indians from state jurisdiction. *Rice v. Olson*, 324 U.S. 786, 789 (1945). This policy may be weakening. *See, Colorado River Water Conservancy District et al v. United States*, 424 U.S. 800 (1976) (state courts have jurisdiction over Indian reserved water rights); (2) state jurisdiction continues over federal lands absent a specific prohibition but the establishment of an Indian reservation preempts state jurisdiction over Indians, tribes, and Indian property. *Compare Kleppe v. New Mexico*, 426 U.S. 529, 542-45 (1976) with *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 2 (1976). *See also, White Mountain Apache Tribe v. Bracker*, ____ U.S. ____, 48 U.S.L.W. 4897 (June 27, 1980); *Central Machinery Co. v. Arizona State Tax Comm'n*, ____ U.S. ____, 48 U.S.L.W. 1930 (June 27, 1980) (preemption analysis in Indian law cases); (3) publicly owned federal lands can be dealt with freely but Indian property rights are protected. *Nat'l. Water Comm'n., Water Policies for the Future -- Final Report to the President and to the Congress of the United States*, 477 (1973). *See Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-85 (1977).

[24]*See Alaska Pacific Fisheries v. United States*. 248 U.S. 78 (1918) (exclusive right to fish implied because necessary for self-sustaining community); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938) (reservation for "absolute and undisturbed use and occupation" includes ownership of minerals and standing timber); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968) (reservation "for a home" includes hunting and fishing rights); and *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976) (U.S. intended to reserve right of Indians to sustain themselves "from any source of food which might be available").

fishing was of economic and religious importance to them. *See Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 665 (1978); *United States v. Winans, supra*, 198 U.S. 371; [1871] *Report of the Commissioner of Indian Affairs*, 277. Their old fishing grounds have been destroyed by dams on the Columbia River and new grounds have been established in Omak Lake by planting a non-indigenous trout.

The issue is difficult, but we agree with the trial court that the maintenance of fishing grounds was one purpose for creating the Colville Reservation and that, under the circumstances, this includes the reestablishment as well as the preservation of grounds.

WATER FOR SPAWNING

The trial court refused to award the Indians water for spawning, finding it unnecessary because the federal government provided fingerlings. In *Cappaert v. United States*, the Supreme Court declared:

> The implied-reservation-of-rights-doctrine, however, reserves only that amount of water necessary to fulfill the purposes of the reservation, no more.

426 U.S. 128, 141 (1976).[25]

The Indians contend that natural spawning is necessary to produce stronger fish. The trial court rejected this contention. The Colvilles failed to show a genuine need to propagate trout by spawning, planting serves their purposes. We affirm the court's conclusion.[26]

TRANSFER OF WATER USE

The court granted the Indians' post-trial motion to use irrigation water for spawning purposes. We hold that this

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[25]The *Cappaert* test, like the *New Mexico* test, may apply less rigidly in Indian cases.

[26]We recognize a problem related to "inverse condemnation." *See United States v. Clarke*, ____ U.S. ____, 48 U.S.L.W. 4258 (March 18, 1980) (no state inverse condemnation of Indian lands). We are wary of allowing the state or federal government to "take" the Indians' water informally by obviating the need for it but we feel constrained by *Cappaert* to hold as we do here, especially because the trout were introduced into Omak Lake by planting.

change of use is proper.

The Special Master in *Arizona v. California*, 373 U.S. 546 (1962), determined that the purposes for which the reservation was created governed the quantification of reserved water, but possibly not its use:

> This [method of quantifying water rights] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses * * * . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

Report from Simon H. Rifkind, Special Master, to the Supreme Court 265-66 (Dec. 5, 1960). The Department of the Interior has taken the position that a change of use is permissible. *See* Memorandum from Solicitor of the Department of the Interior to the Secretary of the Interior, Feb. 1, 1964 (use of reserved water for recreation and housing development).

The Indians must be allowed to use reserved water for new purposes. Water was reserved for them because they lacked the skills to compete successfully for water under state appropriative schemes.[27] *See, Arizona v California, supra*, 373 U.S. at 599-600; *Winters v. United States*, 207 U.S. at 576-77. If their reserved water could only be used for purposes contemplated when the reservation was created, the Indians would be trapped in the nineteenth century. Their land could not be put to its most productive use and they could not pursue new economic opportunities.

Non-Indians are not disadvantaged by this change of use. The Indians are entitled to use a quantity of water.

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[27]Once acquired, state appropriative rights are not easily lost and a change of use will be permitted absent injury to others. *See* I.W. Hutchins, *Water Rights in the Nineteen Western States*, 623 *et seq.* (1977) (general principles); *Id.* Vol. III at 588-90 (Washington law); Wash. Rev. Code § 90.03.380 (1980). It would be very difficult for the Indians to "break in" to the appropriative system once the chain of priorities is established.

How they use it does not affect the amount remaining for appropriation by others. They may use it for agriculture, for a commercial venture, or they may forego its use without infringing on the rights of non-Indians.[28]

Recent Supreme Court cases strictly limiting reserved water rights are concerned primarily with quantification. *See, e.g., United States v. New Mexico, supra,* 438 U.S. 696. Open-ended water rights are a growing source of conflict and uncertainty in the arid west. Until their extent is determined, state-created water rights cannot be relied on by property owners. *See Public Land Law Review Commission, One Third of the Nation's Lands,* 144 (1970).

Limiting reserved rights to the original purposes of the reservation is necessary to the process of quantification because the right must be defined before the amount of reserved water can be calculated. Imposing limits on the use of reserved water, however, would serve no purpose except to frustrate the Indians' economic development. We conclude that the Supreme Court has not curtailed the Indians' use of their reserved water and we decline to do so.

III. STATE REGULATION OF WATER

The trial court determined that Washington is not preempted from regulating reservation water which is not reserved for or used by the Indians. We hold that the State may apportion this water among non-Indians, but do not decide whether its regulatory authority extends further.[29]

Preemption depends on (1) Congressional intent and (2) the extent to which state laws interfere with tribal sovereignty. *See, McClanahan v. Arizona State Tax Commission, supra,* 411 U.S. at 171-72.

Congress has indicated no preemptive intent. The basic statutory scheme is that water rights should be acquired under state law, subject to limited federal reserved rights. *See California-Oregon Power Co. v. Beaver Portland Ce-*

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[28]Although the Indians might be able to use more of their reserved water for unintended than intended purposes, we consider this possibility remote.

[29]For example, we do not decide whether a state may enforce its water quality regulations on the reservation.

ment Co., 295 U.S. 142, 160-63 (1935). Congress made only one specific reference to water rights in the Allotment Act:

> the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations * * *.

25 U.S.C. § 381 (1976). This provision demonstrates no intent to affect state authority over non-Indians.

The second facet of the preemption test, the effect of state laws on tribal sovereignty, was most succinctly discussed by the Supreme Court in *Williams v. Lee:*

> Essentially, absent Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

358 U.S. 217, 220 (1959).[30] State allocation of surplus water among non-Indians has no significant impact upon the tribe.

The trial court correctly concuded that state allocation of surplus water among non-Indians was not preempted. *Compare, White Mountain Apache Tribe v. Bracker*, ___ U.S. ___, 48 U.S.L.W. 4897 (June 27, 1980); *Central Machinery Co. v. Arizona State Tax Commission*, ___ U.S. ___, 48 U.S.L.W. 1950 (June 27, 1980).

TRIBAL PREEMPTION

During the course of this litigation, the tribe enacted a water code that purports to regulate all water on the reservation. We hold that this code does not preempt state law.[31]

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[30]The state's interest in governing non-Indians must be considered:

> [N]otions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians.

McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 171 (1973).

[31]The code, by its own terms, is not effective until it is approved by the Secretary of the Interior. The Secretary has not approved it but has declared that the Department will soon issue its own water regulations for the Colville reservation. We do not decide whether those regulations will preempt state law.

In *Washington v. Confederated Tribes of the Colville Reservation*, the Supreme Court found no tribal preemption in a similar situation:

> There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. * * * And, as already noted, we perceive no intent on the part of Congress to authorize the Tribes to preempt otherwise valid state taxes.

___ U.S. ___, 100 S.Ct. 2069, 2084 (1980).

The *Colville* Court recognized that conflict was possible when state and tribal schemes were for "distributive or regulatory purposes." Although the present case presents a problem of distribution, there is no conflict.

The tribe is not prevented by state law from regulating its reserved water and it has no legitimate interest in regulating the non-Indians' use of surplus water.[32] State created water rights are junior to and therefore not in competition with the Indians' rights. The tribe's water code cannot oust state law because the two distribution schemes are compatible.

The decision of the District Court is AFFIRMED.

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[32]The Tribe must recognize the validity of state-created rights in surplus water. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935) (water severed from public lands and available for appropriation absent prior federal reservation). Its regulatory authority over apportionment encompasses only reserved water and, even there, it can oust state-created rights only by actual use.

APPENDIX F

ORDER GRANTING REHEARING AND DENYING EN BANC SUGGESTION

[June 1, 1981] [reported at 647 F.2d 42]

No. 79-4297

COLVILLE CONFEDERATED TRIBES, Plaintiffs/Appellants,

v.

BOYD WALTON, JR., et ux, et al., Defendants/Appellees,

STATE OF WASHINGTON, Intervening Defendant/Appellee.

No. 79-4309

UNITED STATES OF AMERICA, Appellee,

v.

WILLIAM BOYD WALTON, et ux, et al., Defendants/Appellants,

STATE OF WASHINGTON, Defendant.

No. 79-4383

UNITED STATES OF AMERICA, Plaintiff/Appellee,

v.

WILLIAM BOYD WALTON, et ux, et al., Defendants,

STATE OF WASHINGTON, Defendant/Appellant.

Before: WRIGHT and SKOPIL, Circuit Judges, and CURTIS, Senior District Judge.

In response to the petition for rehearing, the court has reconsidered and withdrawn its opinion of August 20, 1980 and filed today a new opinion. All active judges of the court have received copies of the new opinion, have been advised

of the suggestion for rehearing en banc and none has voted to hear the cause en banc. The en banc suggestion is denied.

Appeal from the United States District Court for the Eastern District of Washington.

Before WRIGHT and SKOPIL, Circuit Judges, and CURTIS,* Senior District Judge.

WRIGHT, Circuit Judge:

Rehearing has been granted. The opinion filed on August 20, 1980 is withdrawn and is replaced by this opinion.

The Colville Confederated Tribes initiated this case a decade ago. They sought to enjoin Walter, non-Indian owner of allotted lands, from using surface and ground waters in the No Name Creek basin. The State of Washington intervened, asserting its authority to grant water permits on reservation lands, and the case was consolidated with a separate suit brought by the United States against Walton.

I. BACKGROUND

A.

In 1871 the predecessors of the Colville Confederate Tribes had no treaty with the United States and no reservation.[1] These Indians were contemporaneously described as "good farmers, [who] raise extensive crops, make good improvements, and own stocks of cattle and horses." [1871] *Report of the Commissioner of Indian Affairs*, 277.

After the Civil War, settlers had begun to encroach on Indian lands. The Farmer in charge at Fort Colville reported that violence was likely unless a reservation was established to protect Indian interests. *Id.* In response to a request from the Commissioner of Indian Affairs, President

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*The Honorable Jesse W. Curtis, Senior District Judge for the Central District of California, sitting by designation.

[1]The Colville Confederated Tribes included the Methow, Okanogan, Sampoil, Nespelem, Lake, and Colville Tribes. *See Confederated Tribes of the Colville Reservation v. United States*, 4 Ind.Cl.Comm. 15 (1956); I. Kappler, *Indian Affairs and Treaties*, 915 (2d ed. 1904). In this opinion, they will be referred to as the Tribe or the Colvilles.

Grant created the Colville Reservation. Executive Order of July 2, 1872, *reprinted in* 1 Kapler, *Indian Affairs, Laws and Treaties,* 915-16. (2d ed. 1904.)[2] Twenty years later, the northern half of the reservation was taken from the Indians and opened for entry and settlement.[3]

In 1906, Congress ratified an agreement with the Colvilles that provided for distribution of reservation lands to the Indians pursuant to the General Allotment Act of 1887, 24 Stat. 388, and for disposition of the remainder by entry and settlement. Act of Mar. 22, 1906, Pub. L. No. 59-61, ch. 1126, 84 Stat. 80. The agreement was effectuated by Presidential proclamation in 1916.[4] 39 Stat. 1778.

In 1917, a row of seven allotments was created in the No Name Creek watershed. Walton, a non-Indian, now owns the middle three, numbers 525, 2371 and 894. He bought them in 1948 from an Indian, not a member of the Tribe, who had begun to irrigate the land by diverting water for 32 acres from No Name Creek. Walton immediately procured a permit from the state to irrigate 65 acres by diverting up to 1 cubic foot per second "subject to existing rights." He now irrigates 104 acres and uses additional water for domestic and stock water purposes.

The United States holds the remaining allotments in trust for the Colville Indians. Allotments 526 and 892 are north of Walton's property and allotments 901 and 903 are south. Allotments 892, 901 and 903 are held for heirs of the original allottees, but the Tribe has a long-term lease. Allotment 526 is beneficially owned by the Tribe.[5]

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[2]Indians who did not live on the land reserved for them were compelled to leave valuable tracts on which they had made extensive improvements and move to the reservation. [1872] *Report of the Commissioner of Indian Affairs,* 62.

[3]Approximately 1.5 million acres were returned to the public domain. Act of July 1, 1892, 27 Stat. 62.

[4]The reservation remained open for settlement until 1934, when the Secretary of the Interior "temporarily" withdrew the surplus lands pursuant to the Reorganization Act. Congress permanently restored those lands to the beneficial use of the Tribe in 1956. Act of July 24, 1956, Pub. L. No. 84-772, ch. 684, 70 Stat. 626. In passing that Act, Congress acknowledged that the Indians' consent to opening the reservation for settlement was of questionable validity. *See* H.R. Rep. No. 2080, 84th Cong., 2d Sess. 2 (1956).

[5]We assume that none of the Colvilles' allotments ever passed from Indian ownership.

B.

The No Name Creek is a spring-fed creek flowing south into Omak Lake, which has no outlet and is saline. The No Name hydrological system, consisting of an underground aquifer and the creek, is located entirely on the Colville Reservation.

The aquifer lies under the Indians' northern allotments and the northern tip of Walton's allotment, number 525. No Name Creek originates on the southern tip of the Indians' allotment number 802 and flows through Walton's allotments and the Indians' southern allotments.

C.

Salmon and trout were traditional foods for the Colville Indians, but the salmon runs have been destroyed by dams on the Columbia River. In 1968, the Tribe, with the help of the Department of the Interior, introduced Lahontan cutthroat trout into Omak Lake. The species thrives in the lake's saline water, but needs fresh water to spawn. The Indians cultivated No Name Creek's lower reach to establish spawning grounds but irrigation use depleted the water flow during spawning season. The federal government has given the Indians fingerlings to maintain the stock of trout.

II. THE CASE BELOW

The trial court found that 1,000 acre feet per year of water were available in No Name Creek Basin in an average year. It calculated the quantity of the Colvilles' reserved water rights on the basis of irrigable acreage. The court excluded the northern-most allotment, number 526, because the evidence showed that it was formerly irrigated with the surface waters of Omak Creek, and the Tribe had not demonstrated that water to irrigate it was required from the No Name system.

The trial court determined the Indians had a reserved right to 666.4 acre feet per year of water from the No Name Creek Basin. It held that Walton was not entitled to share in the Colvilles' reserved water rights. The trial court

found, however, that the Colvilles were irrigating only a portion of the irrigable acres included in its calculation.

Under the district court's findings, in an average year there are 333.6 acre feet per year of water not subject to the Indians' reserved right. There are an additional 237.6 acre feet per year of water to which the Indians have a reserved right, but which they are not currently using. This water is available for appropriation by non-Indians, subject to the Indians' superior right. The court held that Walton had a right to irrigate the 32 acres under irrigation at the time he acquired his land, with a priority date of the actual appropriation of water for that use.

The court also held that the Indians were potentially entitled to use water to propagate trout, but refused to award water for that purpose. It concluded that spawning was unnecessary because fingerlings were provided free by the federal government.

By post-trial motion, the Indians sought permission to use some of their irrigation water for trout spawning. The motion was granted and the Tribe has since pumped aquifer water from their wells into No Name Creek during spawning season.

Finally, the court decided that the state could regulate No Name water not reserved for Indian use.

Walton, the Tribe and the State appeal parts of the decision. *Colville Confederated Tribes v. Walton*, 460 F.Supp. 1320 (E.D. Wash. 1978).[6]

III. THE TRIBE'S WATER RIGHTS

The Colvilles argue they have a right to use the waters of the No Name system under the implied-reservation, or *Winters* doctrine. We first consider the existence and the extent of that right.

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[6]The Tribe asked the United States to intervene on its behalf. Instead, the Justice Department filed a separate suit against Walton, based on the theory that the Secretary of the Interior has exclusive jurisdiction over all the water on the reservation. The trial court consolidated the proceedings *sua sponte*. The United States filed an appeal from the decision and the Tribe moved "not to be bound" by any ruling on *U.S. v. Walton*, No. 79-4619. The United States has since dropped its appeal and we deny the Tribe's motion.

A.

Congress has the power to reserve unappropriated water for use on appurtenant lands withdrawn from the public domain for specific federal purposes. *United States v. New Mexico*, 438 U.S. 696, 698, 98 S.Ct. 3012, 3013, 57 L.Ed.2d 1052 (1978). Where water is needed to accomplish those purposes, a reservation of appurtenant water is implied. *Id.* at 700, 98 S.Ct. at 3014; *Cappaert v. United States*, 426 U.S. 128, 139, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976). The United States acquires a water right vesting on the date the reservation was created, and superior to the rights of subsequent appropriators. *Cappaert*, 436 U.S. at 138, 96 S.Ct. at 2069.

An implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation. In *United States v. Winters*, 207 U.S. 564, 576, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908), the Court found an implied reservation because the land of the Fort Belknap reservation would have been valueless without water. Similarly, an implied reservation was found where water was "essential to the life of the Indian people." *Arizona v. California*, 373 U.S. 546, 599, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542 (1963).

In those cases, if water had not been reserved, it would have been subject to appropriation by non-Indians under state law. Because the Indians were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights, it was reasonable to conclude that Congress intended to reserve water for them.[7]

The Colvilles were in a similar position when their reservation was created. As in *Winters*, the Indians relinquished extensive land and water holdings when the reservation was created. Some gave up valuable tracts with extensive improvements. Note 2, *supra*.

[7]The *Winters* doctrine applies to reservations created by treaty or executive order. *Arizona v. California*, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496, 10 L.Ed.2d 542 (1963).

Congress intended to deal fairly with the Indians by reserving waters without which their lands would be useless. *Arizona v. California*, 373 U.S. at 600, 83 S.Ct. at 1497. We hold that water was reserved when the Colville Reservation was created.

B.

The more difficult question concerns the amount of water reserved. In determining the extent of an implied reservation of water for a national forest, the Supreme Court held:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. New Mexico, 438 U.S. at 702, 98 S.Ct. at 3015.

We apply the *New Mexico* test here. The specific purposes of an Indian reservation, however, were often unarticulated.[8] The general purpose, to provide a home for the

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[8] For example, the order creating the Colville reservation read:

> It is hereby ordered that * * * the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

Executive Order of July 2, 1872, *reprinted in* 1 Kappler, *Indian Affairs and Treaties*, 916 (2d ed. 1904). Reservations were commonly created with similar language. *See* U.S. Dept. of the Interior, *Federal Indian Law*, 613-22 (1958). The President's orders responded to requests from officers in the Department of the Interior but it is difficult to identify or to know how much weight to give to their purpose.

Indians, is a broad one and must be liberally construed.[9] We are mindful that the reservation was created for the Indians, not for the benefit of the government.

To identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances.[10] *See United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905).

These factors demonstrate that one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society. In a similar setting, the Supreme Court agreed with a Master's finding that water was reserved to meet future as well as present needs, and concluded "that the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage." *Arizona v. California*, 373 U.S. at 600-01, 83 S.Ct. at 1497-98. We conclude that, when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation.

Providing for a land-based agrarian society, however, was not the only purpose for creating the reservation. The Colvilles traditionally fished for both salmon and trout.

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[9] *See United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905). The rule of liberal construction should apply to reservations created by Executive Order. *See Arizona v. California*, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496, 10 L.Ed.2d 542 (1963). Congress envisioned agricultural pursuits as only a first step in the "civilizing" process. *See, e.g.*, 11 Cong.Rec. 905 (1881). This vision of progress implies a flexibility of purpose.

[10] *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918) (exclusive right to fish implied because necessary for self-sustaining community); *United States v. Shoshone Tribe*, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1213 (1938) (reservation for "absolute and undisturbed use and occupation" includes ownership of minerals and standing timber); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406, 88 S.Ct. 1705, 1707, 20 L.Ed.2d 697 (1968) (reservation "for a home" includes hunting and fishing rights); and *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976) (U.S. intended to reserve right of Indians to sustain themselves "from any source of food which might be available.")

Like other Pacific Northwest Indians, fishing was of economic and religious importance to them. *See Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 665, 99 S.Ct. 3055, 3064, 61 L.Ed.2d 823 (1978); *United States v. Winans, supra;* [1871] Report of the Commissioner of Indian Affairs 277.

The Tribe's principal historic fishing grounds on the Columbia River have been destroyed by dams. The Indians have established replacement fishing grounds in Omak Lake by planting a non-indigenous trout.

We agree with the district court that preservation of the tribe's access to fishing grounds was one purpose of the creation of the Colville Reservation. Under the circumstances, we find an implied reservation of water from No Name Creek for the development and maintenance of replacement fishing grounds.

We note that the nature of a right to water for a replacement fishery is such that it cannot coexist with continuing rights to water for a fishery in the watershed where the fishery historically existed. Walton does not argue that the tribe has such rights. We affirm the district court's holding that the Colvilles have a reserved right to the quantity of water necessary to maintain the Omak Lake Fishery.

C.

The district court held that water for spawning could not be awarded at this time because the federal government provides the necessary fingerlings. We reverse this holding.

The right to water to establish and maintain the Omak Lake Fishery includes the right to sufficient water to permit natural spawning of the trout. When the Tribe has a vested property right in reserved water, it may use it in any lawful manner. As a result, subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water.

We recognize that open-ended water rights are a growing source of conflict and uncertainty in the West. Until their extent is determined, state-created water rights

cannot be relied on by property owners. *See* Laird, *The Winters Cloud Over the Rockies: Water Rights and the Development of Western Energy Resources*, 7 Am. Indian L.Rev. 15 (1979); Public Land Law Review Commission, *One Third of the Nations Lands*, 144 (1970).

Resolution of the problem is found in quantifying reserved water rights, not in limiting their use. The Special Master in *Arizona v. California* determined that the purposes for which the reservation was created governed the quantification of reserved water, but not the use of such water:

> This [method of quantifying water rights] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses * * * The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but *the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.*

Report from Simon H. Rifkind, Special master, to the Supreme Court 265-66 (December 5, 1960) (emphasis added).

The Department of the Interior has taken the position that a change of use is permissible. *See* Memorandum from Solicitor of the Department of the Interior to the Secretary of the Interior, February 1, 1964 (use of reserved water for recreation and housing development).

Finally, we note that permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation—providing a homeland for the survival and growth of the Indians and their way of life.

D.

We agree with the district court that water for Allotment 526 need not be included in its calculations, since

such water is potentially available from Omak Creek.[11] The Indians have not demonstrated that water is unavailable from Omak Creek, or that its use involves significant disadvantages.[12]

IV. THE GENERAL ALLOTMENT ACT OF 1887

We next consider Walton's rights as the fee owner of allotted land, and reverse the district court's judgment that he has no right to reserved water.

A.

The General Allotment Act provided that land on reservations could be allotted for the exclusive use of individual Indians. Remaining land was to be made available for homesteading by non-Indians. After holding allotted lands in trust for individual Indians for a 25-year period, the federal government could convey the land to the allottee in fee, "discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. § 348.

Because the use of reserved water is not limited to fulfilling the original purposes of the reservation, Congress had the power to allot reserved water rights to individual Indians, and to allow for the transfer of such rights to non-Indians. Whether it did so is a question of congressional intent.

The General Allotment Act represented the shift in federal objectives from segregation of Indians on reservations to assimilation of them in non-Indian culture and society. Its primary sponsor, Senator Dawes, explained that "the quicker [the Indian] is mingled with the whites in every particular the better it will be." Report of the Secretary of the Interior, *Proceedings of Mohonk Lake Conference*, H.R. Exec. Doc. No. 75, 49th Cong., 2d Sess. 992 (1887).

The Act was designed to encourage Indians to become

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[11] Omak Creek and No Name Creek have no surface connection.

[12] The Indians may be deprived of the use of wells drilled on allotment 526 but those were constructed with the understanding that this litigation would be unaffected.

self-supporting citizens by making them landowners. *See generally* D. Otis, *The Dawes Act and the Allotment of Indian Lands* 8-32 (1973). Allotted lands were held in trust for a 25-year period because of

> the desire to protect the Indian against sharp practices leading to Indian landlessness, the desire to safeguard the certainty of titles, and the urge to continue an important basis of governmental activity [on the Indians' behalf].

F. Cohen, *Handbook of Federal Indian Law* 221 (1940); U.S. Department of Interior, *Federal Indian Law* 788-89 (1958).

The only reference to water rights in the Act is found in section 7:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by an riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

25 U.S.C. § 381.

The Act was passed over 20 years before the Supreme Court announced the implied-reservation doctrine in *Winters*. There is nothing to suggest Congress gave any consideration to the transferability of reserved water rights. To resolve this issue, we must determine what Congress would have intended had it considered it.

B.

It is settled that Indian allottees have a right to use reserved water. *United States v. Powers*, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 830 (1939).[13] "[W]hen allotments were

[13]In *Powers*, the federal government had constructed an irrigation project on the Crow Reservation capable of irrigating 20,000 acres. Due to a drought and upstream diversions by respondents (non-Indian successors to Indian allottees), 8,000 acres within the project could not be irrigated.

made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." *Id.* at 532, 59 S.Ct. at 346. We must determine whether non-Indian purchasers of allotted lands also obtain a right to some portion of reserved waters.

(1)

The general rule is that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history. *See Bryan v. Itasca County*, 426 U.S. 373, 392-93, 96 S.Ct. 2102, 2112-13, 48 L.Ed.2d 710 (1975); *Mattz v. Arnett*, 412 U.S. 481, 504-05, 93 S.Ct. 2245, 2257-58, 37 L.Ed.2d 92 (1972). Upon careful consideration, we conclude this principle supports the proposition that an Indian allottee may sell his right to reserved water.

The district court's holding that an Indian allottee may convey only a right to the water he or she has actually appropriated with a priority date of actual appropriation reduces the value of the allottee's right to reserved water.

The government sought an injunction against respondents' diversions. The irrigation project had been completed prior to allotment of respondents' lands. The government argued that the project served to "dedicate and reserve" water for irrigation of the 20,000 acres, and that the rights subsequently acquired by Indian allottees were subject to that reservation.

The Court stated the respondents "succeeded to the interest of the original allottees either by mesne conveyances or by purchase at government sales of deceased allottees' lands." 305 U.S. at 531, 59 S.Ct. at 346. It then recited the government's argument and refuted it, relying in part on section 7 of the Allotment Act, by demonstrating that Indian allottees acquired a right to share in reserved water.

The Court held the government had shown no basis for the injunction, but did not consider "the extent or precise nature of respondents' rights in the waters." 305 U.S. at 533, 59 S.Ct. at 346.

If an Indian allottee's right to reserved water does not pass to his or her successor, there would have been a basis for the injunction. Walton therefore argues that *Powers* holds an allottee's right to reserved water is acquired by his non-Indian successor. The government, however, did not present that issue. The Court rejected the only argument made by the government, *i.e.*, that Indian allottees did not acquire rights to reserved water.

We think this type of restriction on transferability is a "diminution of Indian rights" that must be supported by a clear inference of Congressional intent.

By placing allotted lands in trust for 25 years, Congress evinced an intent to protect Indians by preventing transfer of those lands.[14] But there is no basis for an inference that some restrictions survived beyond the trust period. Congress provided for extensions of the trust period, but directed that fee title be conveyed to the allottee when the period expired. We think the fee included the appurtenant right to share in reserved waters, and see no basis for limiting the transferability of that right.

This conclusion is supported by our decision in *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). *Ahtanum* held that non-Indian purchasers of allotted lands are entitled to "participate ratably" with Indian allottees in the use of reserved water. *See United States v. Adair*, 478 F.Supp. 336 (D.Ore. 1979); *United States v. Hibner*, 27 F.2d 909 (D.Idaho 1928).

(2)

In determining the nature of the right acquired by non-Indian purchasers, we consider three aspects of an allottee's right to use reserved waters.

First, the extent of an Indian allottee's right is based on the number of irrigable acres he owns. If the allottee owns 10% of the irrigable acreage in the watershed, he is entitled to 10% of the water reserved for irrigation (i.e., a "ratable share"). This follows from the provision for an equal and just distribution of water needed for irrigation.

A non-Indian purchaser cannot acquire more exten-

[14]The subsequent history of the General Allotment Act demonstrates that this protection was extraordinarily inadequate. By the 1930's approximately 90 million acres out of 140 million acres owned by Indian tribes in 1887 had passed into non-Indian ownership. American Indian Policy Review Commission, Final Report 66-70 (1977). This history, however, has no bearing on congressional intent with regard to water rights in 1887; if anything, it demonstrates Congress intended less protection for Indian rights than the rhetoric of the Act's sponsor would suggest.

sive rights to reserved water than were held by the Indian seller. Thus, the purchaser's right is similarly limited by the number of irrigable acres he owns.

Second, the Indian allottee's right has a priority as of the date the reservation was created. This is the principal aspect of the right that renders it more valuable than the rights of competing water users, and therefore applies to the right acquired by a non-Indian purchaser. In the event there is insufficient water to satisfy all valid claims to reserved water, the amount available to each claimant should be reduced proportionately.

Third, the Indian allottee does not lose by non-use the right to a share of reserved water. This characteristic is not applicable to the right acquired by a non-Indian purchaser. The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.

The full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser. There is no diminution in the right the Indian may convey. We think Congress would have intended, however, that the non-Indian purchaser, under no competitive disability vis-a-vis other water users, may not retain the right to that quantity of water despite non-use. *See United States v. Adair*, 478 F.Supp. at 348-49; *United States v. Hibner*, 27 F.2d at 912.

C.

The district court's holding that Walton has no right to share in water reserved when the Colville reservation was created is reversed. On remand, it will need to determine the number of irrigable acres Walton owns, and the amount of water he appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water.

V. STATE PERMITS

Finally, we consider Walton's claim to water rights based on state water permits. We hold that the state has no power to regulate water in the No Name system, and the permits are of no force and effect.

A.

State regulatory authority over a tribal reservation may be barred either because it is pre-empted by federal law, or because it unlawfully infringes on the right of reservation Indians to self-government. *White Mountain Apache Tribe v. Bracker*, ____ U.S. ____, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980); *White Mountain Apache Tribe v. Arizona*, Nos. 78-3427, 79-4294, Slip op. p. 1190, ____ F.2d ____ (9th Cir., April 6, 1981). Although these barriers are independent, they are related by the concept of tribal sovereignty. "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Bracker*, 100 S.Ct. at 2573.

Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. *Id.; United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

> The sovereignty that the Indian tribes retair is of a unique and limited character. It exists only at the sufference of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

United States v. Wheeler, 435 U.S. 313, 823, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978) (citations omitted).

A tribe's inherent power to regulate generally the conduct of non-members on land no longer owned by, or held in trust for the tribe was impliedly withdrawn as a necessary result of its dependent status. *Montana v.*

United States, ____ U.S. ____, 101 S.Ct. 1245, 1257, 67 L.Ed.2d 493 (1981). Exceptions to this implied withdrawal exist. A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. *Id.* This includes conduct that involves the tribe's water rights. *See id.* at n.15.

A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users. The Colvilles' complaint in the district court alleged that the Walton's appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishery, among other things. *Cf. Montana*, ____ U.S. at ____, 101 S.Ct. at 1259 (complaint did not allege peril to subsistence or welfare of tribe from non-Indian hunting and fishing on fee lands).

Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.

Although we need not decide whether this power resides exclusively in the tribe or the federal government, or whether it may be exercised by them jointly, its importance forms the backdrop for our consideration of the preemption issue.

B.

We hold that state regulation of water in the No Name system was preempted by the creation of the Colville Reservation. The geographic facts of this case make resolution of this issue somewhat easier than it otherwise might be. The No-Name water system is non-navigable and is entirely within the boundaries of the reservation. Although some of the water passes through lands now in non-Indian ownership, all of those lands are also entirely within the reservation boundaries.

The Supreme Court has held that water use on a federal reservation is not subject to state regulation absent

explicit federal recognition of state authority. *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955).[15] Thus, in creating the Colville Reservation, the federal government preempted state control of the No Name system.[16]

In *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1934), we held that state water laws are not controlling on an Indian reservation:

> [T]he Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands within the limits of the state, 'shall remain under the absolute jurisdiction and control of the Congress of the United States.'

Identical language appears in the Washington Enabling Act, Ch. 180, 25 Stat. 676, 677 (1889).[17]

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[15]The FPC had licensed construction of a dam on federal property. The lands that would have been flooded were held by the federal government. They had been reserved either as an Indian reservation or for power generation. The flow of the river would have been undiminished below the dam.

This court held the licensee had to obtain state approval because of the state's control over non-navigable waters on the public domain. 211 F.2d 347 (9th Cir. 1954).

The Supreme Court reversed. It held that congressional acts giving the states control of water on the public domain were inapplicable on a federal reservation.

> It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated for some other purpose * * * [I]t is enough for the instant case, to recognize that these Acts do not apply to this license, which relates only to the use of waters on reservations of the United States.

349 U.S. at 448, 75 S.Ct. at 840 (citations omitted).

[16]We need not consider what effect the opening of reservation lands for entry and settlement had on the control of water on or appurtenant to such lands. All of the lands here involved were allotted.

[17]The state argues that *McIntire* is distinguishable for two reasons. First, it argues the court had already held the waters were reserved. It is clear, however, that the court did not rely on this in holding state water law inapplicable on the reservation.

Second, Washington argues the purchase of allotted lands by a non-Indian "severed * * * any special federal trust status." The lands are still part of the reservation, however. The only mention of water rights in the Allotment Act suggests continued federal control. 25 U.S.C. § 381.

We adhere to this holding because we find no indication Congress intended the state to have this power. In a series of Acts culminating in the Desert Lands Act of 1877, ch. 107, 19 Stat. 377, Congress gave the states plenary control of water on the public domain. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64, 55 S.Ct. 725, 731, 79 L.Ed.2d 1356 (1935). Based on this and other legislation, the Supreme Court concluded that Congress almost invariably defers to state water law when it expressly considers water rights. *United States v. New Mexico*, 438 U.S. 696, 702, 98 S.Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978).

This deference is not applicable to water use on a federal reservation, at least where such use has no impact off the reservation. *FPC v. Oregon*, 349 U.S. at 448, 75 S.Ct. at 840. The usual policy stems in part from the need to permit western states to fashion water rights regimes that are responsive to local needs, and in part from the "legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *California v. United States*, 438, U.S. 645, 653-54, 668-69, 98 S.Ct. 2985, 2989-90, 2997-98, 57 L.Ed.2d 1018 (1978).

Neither rationale is applicable here. Where land is set aside for an Indian reservation, Congress has reserved it for federal, as opposed to state needs. Because the No Name system is located entirely within the reservation, state regulation of some portion of its waters would create the jurisdictional confusion Congress has sought to avoid.

Public Law 280, Act of August 15, 1953, 67 Stat. 588, did not delegate this regulatory power to the state. Nor do we perceive the McCarran Amendment, 43 U.S.C. § 666, as expanding the state's regulatory powers over water on a federal reservation.

Finally, we note that the state's interest in extending its water law to the reservation is limited in this case. Tribal or federal control of No Name waters will have no impact on state water rights off the reservation.

Thus, we conclude that Walton's state permits are of no force and effect.

VI. CONCLUSION

On remand, the district court will calculate the respective rights of the parties. To the extent Walton's use of water exceeds his rights and interferes with the rights of the tribe, it will be enjoined.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED for proceedings in conformance with this opinion. The parties will bear their own costs on this appeal.[18]

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[18]We are persuaded of the correctness of our analysis and conclusion concerning the transferability of the water rights involved in this litigation. Nevertheless, we recognize that reasonable minds hold conflicting views. State and federal court, state and federal agencies responsible in water rights administration, and the numerous Indian tribes, allottees and their transferees, are plagued almost on a daily basis with the problems and uncertainties surrounding the issues discussed in this opinion. This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated.

APPENDIX G

EXECUTIVE ORDER CREATING COLVILLE INDIAN RESERVATION

EXECUTIVE ORDER DATED APRIL 9, 1872

Department of the Interior
Office of Indian Affairs
Washington, D.C., April 8, 1872

Sir: I have the honor to invite your attention to the necessity for the setting apart by Executive order of a tract of country hereinafter described as a reservation for the following bands of Indians in Washington Territory, not parties to any treaty, viz:

The Methow Indians, numbering	316
The Okanogan Indians, numbering	340
The San Poil Indians, numbering	538
The Lake Indians, numbering	230
The Colville Indians, numbering	631
The Calispel Indians, numbering	420
The Spokane Indians, numbering	725
The Coeur d'Alene Indians, numbering	700
The scattering bands	300
Total	4,200

***Excluding that portion of the tract of country referred to, found to be in the British possessions, the following are the natural boundaries of the proposed reservation, which I have the honor to recommend be set apart by the President for the Indians in question, and such others as the department may see fit to settle thereon, viz: Commencing at a point on the Columbia where the Spokane River empties in the same; thence up the Columbia River to where it crosses the forty-ninth parallel north latitude: thence, east, with said forty-ninth parallel, to where the Pend d'Orielle or Clark River crosses the same; thence up the Pend d'Orielle or Clark River to where it crosses the western boundary of Idaho Territory, the one hundred and seventeenth meridian west longitude; thence

south, along said one hundred and seventeenth meridian, to where the Little Spokane River crosses the same; thence southwesterly, with said river, to its junction with the Big Spokane River; thence down the Big River to the place of beginning.

The papers hereinbefore referred to are respectfully submitted herewith.

Very respectfully, your obedient servant,

F. A. Walker, Commissioner

The SECRETARY OF THE INTERIOR

EXECUTIVE MANSION,
Washington, D.C., April 9, 1872

It is hereby ordered that the tract of country referred to in the within letter of the Acting Secretary of the Interior, and designated upon the accompanying map, be set apart for the bands of Indians in Washington Territory named in communication of the Commissioner of Indian Affairs dated the 8th instant, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U.S. GRANT

APPENDIX H

EXECUTIVE ORDER DATED JULY 2, 1872

EXECUTIVE MANSION,
Washington, D.C., July 2, 1872

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U.S. GRANT

APPENDIX I

RCW 90.03.010, and 90.03.250 through 90.03.345

RCW 90.03.010 Appropriation of water rights—Existing rights preserved. The power of the state to regulate and control the waters within the state shall be exercised as hereafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereinafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise. They shall, however, be subject to condemnation as provided in RCW 90.03.040, and the amount and priority thereof may be determined by the procedure set out in RCW 90.03.110 through 90.03.240. [1917 c 117 § 1; RRS § 7351. Prior: 1891 p 127 § 1. Formerly RCW 90.04.020.]

RCW 90.03.250 Appropriation procedure—Application for permit—Temporary permit. Any person, municipal corporation, firm, irrigation district, association, corporation or water users' association hereafter desiring to appropriate water for a beneficial use shall make an application to the supervisor of water resources for a permit to make such appropriation, and shall not use or divert such waters until he has received a permit from such supervisor as in this chapter provided. The construction of any ditch, canal or works, or performing any work in connection with said construction or appropriation, or the use of any waters, shall not be an appropriation of such water nor an act for the purpose of appropriating water unless a permit to make said appropriation has first been granted by the supervisor: *Provided,* That a temporary permit may be granted upon a proper showing made to the supervisor to be valid only during the pendency of such

application for a permit unless sooner revoked by said supervisor: *Provided, further,* That nothing in this chapter contained shall be deemed to affect RCW 90.40.010 through 90.40.080 except that the notice and certificate therein provided for in RCW 90.40.030 shall be addressed to the supervisor of water resources after the passage of this act, and the supervisor shall exercise the powers and perform the duties prescribed by RCW 90.40.030. [1917 c 117 § 27; RRS § 7378. Formerly RCW 90.20.010.]

RCW 90.03.260 Appropriation procedure—Application—Contents. Each application for permit to appropriate water shall set forth the name and post office address of the applicant, the source of water supply, the nature and amount of the proposed use, the time during which water will be required each year, the location and description of the proposed ditch, canal, or other work, the time within which the completion of the construction and the time for the complete application of the water to the proposed use. If for agricultural purposes, it shall give the legal subdivision of the land and the acreage to be irrigated, as near as may be, and the amount of water expressed in acre feet to be supplied per season. If for power purposes, it shall give the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the uses to which the power is to be applied. If for construction of a reservoir, it shall give the height of the dam, the capacity of the reservoir, and the uses to be made of the impounded waters. If for municipal water supply, it shall give the present population to be served, and, as near as may be, the future requirement of the municipality. If for mining purposes, it shall give the nature of the mines to be served and the method of supplying and utilizing the water; also their location by legal subdivisions. All applications shall be accompanied by such maps and drawings, in duplicate, and such other data, as may be required by the supervisor of water resources, and such accompanying data shall be considered as a part of the application. [1917 c 117 § 28; RRS § 7379. Formerly RCW 90.20.020.]

RCW 90.03.270 Appropriation procedure—Record of application. Upon receipt of an application it shall be the duty of the supervisor of water resources to make an endorsement thereon of the date of its receipt, and to keep a record of same. If upon examination, the application is found to be defective, it shall be returned to the applicant for correction or completion, and the date and the reasons for the return thereof shall be endorsed thereon and made a record in his office. No application shall lose its priority of filing on account of such defects, provided acceptable maps, drawings, and such data as is required by the supervisor shall be filed in the office of the supervisor within such reasonable time as he shall require. [1917 c 117 § 29; RRS § 7380. Formerly RCW 90.20.030.]

RCW 90.03.280 Appropriation procedure—Notice. Upon receipt of a proper application, the supervisor shall instruct the applicant to publish notice thereof in a form and within a time prescribed by him in a newspaper of general circulation published in the county or counties in which the storage, diversion, and use is to be made, and in such other newspapers as he may direct, once a week for two consecutive weeks. Upon receipt by the supervisor of an application he shall send notice thereof containing pertinent information to the director of fisheries and the director of game. [1953 c 275 § 1; 1939 c 127 § 1; 1925 ex.s. c 161 § 1; 1917 c 117 § 30; RRS § 7381. Formerly RCW 90.20.040]

RCW 90.03.290 Appropriation procedure—Supervisor to investigate—Preliminary permit—Findings and action on application. When an application complying with the provisions of this chapter and with the rules and regulations of the supervisor of water resources has been filed, the same shall be placed on record in the office of the supervisor, and it shall be his duty to investigate the application, and determine what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied. If it is proposed to appropriate water for irrigation purposes, the

supervisor shall investigate, determine and find what lands are capable of irrigation by means of water found available for appropriation. If it is proposed to appropriate water for the purpose of power development, the supervisor shall investigate, determine and find whether the proposed development is likely to prove detrimental to the public interest, having in mind the highest feasible use of the waters belonging to the public. If the application does not contain, and the applicant does not promptly furnish sufficient information on which to base such findings, the supervisor may issue a preliminary permit, for a period of not to exceed three years, requiring the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the supervisor may be necessary. If the applicant fails to comply with the conditions of the preliminary permit, it and the application or applications on which it is based shall be automatically canceled and the applicant so notified. If the holder of a preliminary permit shall, before its expiration, file with the supervisor a verified report of expenditures made and work done under the preliminary permit, which, in the opinion of the supervisor, establishes the good faith, intent and ability of the applicant to carry on the proposed development, the preliminary permit may, with the approval of the governor, be extended, but not to exceed a maximum period of five years from the date of the issuance of the preliminary permit. The supervisor shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if he shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, he shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied: *Provided*, That where the water applied for is to be used for irrigation purposes, it shall become appurtenant only to such lands as may be reclaimed thereby to the full extent of the soil for agricultural purposes. But where there is no unappropriated water in the proposed source of supply, or where the

proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, it shall be duty of the supervisor to reject such application and to refuse to issue the permit asked for. If the permit is refused because of conflict with existing rights and such applicant shall acquire same by purchase or condemnation under RCW 90.03.040, said supervisor may thereupon grant such permit. Any application may be approved for a less amount of water than that applied for, if there exists substantial reason therefor, and in any event shall not be approved for more water than can be applied to beneficial use for the purposes named in the application. In determining whether or not a permit shall issue upon any application, it shall be the duty of the supervisor to investigate all facts relevant and material to the application. After the supervisor approves said application in whole or in part and before any permit shall be issued thereon to the applicant, such applicant shall pay the fee provided in RCW 90.03.470: *Provided, further,* That in the event a permit is issued by the supervisor upon any application, it shall be his duty to notify both the director of fisheries and the director of game of such issuance. [1947 c 133 § 1; 1939 c 127 § 2; 1929 c 122 § 4; 1917 c 117 § 31; Rem. Supp. 1947 § 7382. Formerly RCW 90.20.050 and 90.20.060.]

RCW 90.03.300 Appropriation procedure—Diversion of water for out-of-state use—Reciprocity. No permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application for such permit, or any portion of the works in such application described and to be constructed for the purpose of storing, conserving, diverting or distributing such water, or because the place of intended use or the lands to be irrigated by means of such water, or any part thereof, may be situated in some other state or nation, but in all such cases where either the point of diversion or any of such works or the place of intended use, or the lands, or part of the lands, to be irrigated by

means of such water, are situated within the state of Washington, the permit shall issue as in other cases: *Provided, however,* That the supervisor of water resources may in his discretion, decline to issue a permit where the point of diversion described in the application is within the state of Washington but the place of beneficial use in some other state or nation, unless under the laws of such state or nation water may be lawfully diverted within such state or nation for beneficial use in the state of Washington. [1921 c 103 § 3; RRS § 7383. Formerly RCW 90.20.070.]

RCW 90.03.310 Appropriation procedure—Assignability of permit or application. Any permit to appropriate water may be assigned subject to the conditions of the permit, but no such assignment shall be binding or valid unless filed for record in the office of the supervisor of water resources. Any application for permits to appropriate water prior to permit issuing, may be assigned by the applicant, but no such assignment shall be valid or binding unless the written consent of the supervisor is first obtained thereto, and unless such assignment is filed for record in the office of the supervisor. [1917 c 117 § 32; RRS § 7384. Prior: 1891 c 142 § 6. Formerly RCW 90.20.080.]

RCW 90.03.320 Appropriation procedure—Construction work. Actual construction work shall be commenced on any project for which permit has been granted within such reasonable time as shall be prescribed by the supervisor of water resources, and shall thereafter be prosecuted with diligence and completed within the time prescribed by the supervisor. The supervisor, in fixing the time for the commencement of the work, or for the completion thereof and the application of the water to the beneficial use prescribed in the permit, shall take into consideration the cost and magnitude of the project and the engineering and physical features to be encountered, and shall allow such time as shall be reasonable and just under the conditions then existing, having due regard for the public welfare and public interests affected; and, for good

cause shown, he shall extend the time or times fixed as aforesaid, and shall grant such further period or periods as may be reasonably necessary, having due regard to the good faith of the applicant and the public interests affected. If the terms of the permit or extension thereof, are not complied with the supervisor shall give notice by registered mail that such permit will be canceled unless the holders thereof shall show cause within sixty days why the same should not be so canceled. If cause be not shown, said permit shall be canceled. [1917 c 117 § 33; RRS § 7385. Formerly RCW 90.20.090.]

RCW 90.03.330 Appropriation procedure—Water right certificate. Upon a showing satisfactory to the supervisor of water resources that any appropriation has been perfected in accordance with the provisions of this chapter, it shall be the duty of such supervisor to issue to the applicant a certificate stating such facts in a form to be prescribed by him, and such certificate shall thereupon be recorded in his office. Any original water right certificate issued, as provided by this chapter, shall be recorded in his office and thereafter, at the expense of the party receiving the same, be by such supervisor transmitted to the county auditor of the county or counties where the distributing system or any part thereof is located, and be recorded in the office of such county auditor, and thereafter be transmitted to the owner thereof. [1929 c 122 § 5; 1917 c 117 § 34; RRS § 7386. Formerly RCW 90.20.100.]

RCW 90.03.340 Appropriation procedure—Effective date of water right. The right acquired by appropriation shall relate back to the date of filing of the original application in the office of the supervisor of water resources. [1917 c 117 § 35; RRS 7387. Formerly RCW 90.20.110.]

RCW 90.03.345 Establishment of reservations of water for certain purposes and minimum flows or levels as constituting appropriations with priority dates. The establishment of reservations of wa-

ter for agriculture, hydroelectric energy, municipal, industrial, and other beneficial uses under RCW 90.54.050(1) or minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment. Whenever an application for a permit to make beneficial use of public waters embodied in a reservation, established after the effective date of this act, is filed with the department of ecology after the effective date of such reservation, the priority date for a permit issued pursuant to an approval by the department of ecology of the application shall be the effective date of the reservation. [1979 1st ex.s. c 216 § 7.]

Amicus Brief

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NO. 81-421

IN THE

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,
AND
COLVILLE CONFEDERATED TRIBES,

Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WYOMING, IDAHO, CALIFORNIA, SOUTH DAKOTA, COLORADO, MONTANA, NEVADA, UTAH, NORTH DAKOTA AS AMICUS CURIAE.

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QUESTION PRESENTED

Although the June 1, 1981 decision of the United Staes Court of Appeals for the Ninth Circuit addressed several questions, this Brief of Amici is confined to the following issue:

Did Congress intend to preempt the State of Washington's power to allocate and grant property rights in excess waters, for use on fee lands owned by non-Indians, within the presidentially-created Colville Indian Reserveration?

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INTEREST OF AMICI

All western states have intricate systems of water allocation. These state allocation systems are adapted to and have developed because of local climate, water use patterns and water supply. They have promoted progress, growth and economic stability in a region where water is the lifeblood of all that transpires.

It cannot be denied that the United States has the power, in conjunction with the reservation of land, to reserve water which has not been previously allocated under state law. *United States v. Winters*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963). But, the power of the states to allocate unreserved water has never been questioned.

The more narrow issue here, however, is whether the State may allocate unreserved water within the boundaries of a reservation of land. The extensive practice of western states has been to allocate unreserved water within the federal reservations of land. The decision of the Ninth Circuit herein will cause chaos in the western states among the water users who have relied on the state allocation of unreserved water.

The *amici* submit that the Ninth Circuit Court of Appeals has disregarded those conditions and the pronouncements of this Court in holding that the creation of the Colville Indian Reservation, by Executive Order, totally preempted state regulation of unreserved, surplus water within the boundaries of the reservation.

ARGUMENT

CONGRESS HAS RECOGNIZED AND DEFERRED TO THE RIGHT OF STATES TO ALLOCATE THEIR WATER RESOURCES. IN CARRYING OUT THIS REGULATION, WESTERN STATES HAVE

TRADITIONALLY EXERCISED JURISDICTION OVER WATERS WITHIN INDIAN RESERVATION BOUNDARIES.

As this Court has repeatedly recognized, Congress has traditionally deferred to the power of the states to allocate waters within their boundaries. In *United States v. New Mexico*, 438 U.S. 696 (1978) this Court stated:

> Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. 438 U.S. at 702.

Since the early part of this century, the State of Wyoming has allocated water to hundreds of water users, (Indian, non-Indian and the federal government) within the boundaries of the Wind River Indian Reservation for a variety of uses, including the irrigation of over 150,000 acres of land.

The State of Idaho since the early 1900's has issued permits and licenses for use of water within the boundaries of Indian reservations. Nearly 600 state water permits and licenses have been issued for use within the boundaries of the Coeur d'Alene, Nez Perce and Fort Hall Indian reservations. In the State of Montana, since July 1, 1973, the date of passage of comprehensive legislation relating to administration of water resources, a total of 910 certificates, permits and changes of use have been issued by the Water Resources and Conservation Division of the State of Montana for water uses within the boundaries of Montana's seven Indian reservations.

The systems of water rights administration in Utah and Colorado are also structured to include water uses within Indian reservation boundaries. Moreover, this historical practice has not been confined to areas in the mountain west; California, Oregon and New Mexico have traditionally issued

water rights within Indian reservation boundaries. Also, in North Dakota, within which five Indian reservations are found, it has been the long standing policy and practice that non-Indians who desire to use water within the boundaries of an Indian reservation must first secure a state water permit from the State Engineer. This policy has not been challenged by either Indian or non-Indian water users.

In South Dakota, 274 water rights permits have been granted, and vested rights validated, within undiminished portions of Indian reservations. Additionally, 294 permits have been granted within diminished portions of Indian reservations. Further, the South Dakota State Engineer estimates that several thousand state created water rights which are not subject to the formal state permitting process exist within diminished and undiminished portions of South Dakota's Indian reservations.

As the above examples demonstrate, the historical precedent in the West has been for Western States to allocate water rights within Indian reservations located within the states.

There is little doubt that if the Ninth Circuit's holding regarding state jurisdiction is allowed to stand, virtually every tribe in the western United States would claim a similar right to exclude states from administering their water rights laws with regard to non-Indians within reservation boundaries. Gaping holes would be created in state systems of water allocation and administration. Water rights of Indians and non-Indians who live, work or farm within Indian reservation boundaries would be invalidated.

CONCLUSION

The *amici* are justificable disturbed with the Ninth Circuit's holding that the creation of the Colville Indian reservation totally preempted state jurisdiction over excess waters used on non-Indian owned fee lands located within the reservation. The *amici*, therefore, urge that this Court grant the State of Washington's Petition for a Writ of Certiorari to review the June 1, 1981 decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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